

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1964~~ 1965

No. ~~625~~ 15

FEDERAL TRADE COMMISSION, PETITIONER,

VS.

MARY CARTER PAINT CO., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

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[fol. a]

**IN THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT**

No. 19,982

**MARY CARTER PAINT Co., A CORPORATION, JOHN C. MILLER
AND I. G. DAVIS, JR., AS OFFICERS OF SAID CORPORATION,
AND ROBERT VAN WORP, JR., Petitioners,**

versus

FEDERAL TRADE COMMISSION, Respondent.

**Petition for Review of an Order of the Federal Trade
Commission. (District of Florida.)**

[fol. 1] IN THE UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

STIPULATION OF PRINTED RECORD—Filed March 8, 1963

[Title omitted]

It is hereby Stipulated and Agreed, by and between the petitioners and the respondent, that the following portions of the record be designated for printing.

1. The following pleadings:

- (a) The complaint and answer;
- (b) The proposed findings of the petitioner (pages 20 through 31 of the document entitled "Respondents' Brief and Proposed Findings");
- (c) The initial decision of the Hearing Examiner, including the findings, conclusion and order; and
- (d) The final order and opinion of the Commission and the dissenting opinion of Commissioner Elman.

2. The following portions of the transcript of the proceedings before the Hearing Examiner:

From		To	
Page	Line	Page	Line
2B	3	2B	19
2C	22	2D	4
40	20	41	17
[fol. 2]			
44	22	46	13
48	10	51	7
52	10	54	14
56	9	62	4
62	20	62	25
68	17	73	17
76	4	77	16
80	9	80	25
86	13	87	23
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From		To	
Page	Line	Page	Line
110	13	110	24
117	11	117	22
138	18	144	4
144	23	157	23
168	15	182	25
184	23	184	25
187	4	194	6
211	5	212	9
224	16	237	22
243	16	269	13
270	20	272	21
274	11	277	21
280	15	287	21
296	9	299	13

3. The following Commission's Exhibits which were received in evidence during the proceedings before the Hearing Examiner: 2, 3, 5, 6, 8, 9, 27, 29, 31, 33, 35, 40, 41, 43, 45, 47, 48, 49, 50, 60, 66, 67 (print only pages 36 through 41 and 44 through 58 thereof).

[fol. 3] 4. The following Respondents' Exhibits which were received in evidence during the proceedings before the Hearing Examiner: 2 and 23.

5. The following Respondents' Exhibits which were marked for identification, excluded from evidence, and, pursuant to Rule 4.12f of the Federal Trade Commission Rules of Practice, were accepted for reporting purposes only: 9A(id.)-9E(id.), 19A(id.)-19F(id.).

6. The Federal Trade Commission does not by this stipulation waive any objections to the relevance of testimony and exhibits which were excluded by the Hearing Examiner below.

Dated: February 28, 1963.

Sullivan & Cromwell, by Richard Sexton, Attorneys
for Petitioners, 48 Wall Street, New York 5, N.Y.
J. B. Truly, Assistant General Counsel, Attorney
for Respondent.

Federal Trade Commission, Washington 25, D. C.

[fol. 4] BEFORE THE FEDERAL TRADE COMMISSION

Docket 8290

IN THE MATTER OF: MARY CARTER PAINT CO., INC., ET AL.

SECRETARY'S CERTIFICATE—October 15, 1962

I, Joseph W. Shea, Secretary of the Federal Trade Commission, and official custodian of its records, do hereby certify that transmitted herewith is a full, true, and complete transcript of proceedings had before the Federal Trade Commission in the above entitled matter, in four parts, as follows:

Part 1—Pleadings.

Part 2—Exhibits—Documentary—Commission 1 to 54, incl.

Part 3—Exhibits—Documentary—Commission 55 to 71, incl.

Exhibits—Documentary—Respondent 1 to 23, incl.

Part 4—Public Docket Sheets.

and original physical exhibits:

2-1	2-2	2-3
<hr/>	<hr/>	<hr/>
8290-1	8290-1	8290-1

That this transcript is certified to the United States Court of Appeals for the Fifth Circuit, pursuant to the filing in [fol. 5] said Court of a petition for review of a Final Order and Order to Cease and Desist issued by the Federal Trade Commission June 28, 1962, in the above indicated proceeding.

In witness whereof, I hereunto subscribe my name, and affix the seal of the said Federal Trade Commission, at its office in the City of Washington, D. C., this 15th day of October, A. D. 1962.

Joseph W. Shea, Secretary.

[fol. 6] BEFORE THE FEDERAL TRADE COMMISSION

COMPLAINT—February 15, 1961

Docket No. 8290

In the Matter of: MARY CARTER PAINT COMPANY, INC., A CORPORATION, AND JOHN C. MILLER AND I. G. DAVIS, INDIVIDUALLY AND AS OFFICERS OF SAID CORPORATION, AND ROBERT VAN WORP, JR., INDIVIDUALLY.

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Mary Carter Paint Company, Inc., a corporation, and John C. Miller and I. G. Davis, individually and as officers of said corporation, and Robert Van Worp, Jr., individually, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

Paragraph One: Respondent Mary Carter Paint Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at Gunn Highway at Henderson Road, Tampa, Florida. Respondent corporation also maintains offices in New York, said address being 666 Fifth Avenue, New York, New York. [fol. 7] John C. Miller and I. G. Davis are officers of said corporation. They presently formulate, direct and control the policies of the corporate respondent. Their address is the same as that of the corporate respondent.

Robert Van Worp, Jr. was formerly an officer of said corporate respondent, at which time he cooperated in formulating, directing and controlling the policies of the said corporate respondent in connection with the acts and practices set forth herein. His address is the same as that of the corporate respondent.

Paragraph Two: Corporate respondent Mary Carter Paint Company, Inc., and John C. Miller and I. G. Davis, officers of said corporation, are engaged in the business of

manufacturing, selling and distributing paint and related products to the public, under the label or trade name of "Mary Carter", through various retail outlets and franchise dealers located in the various States of the United States.

Paragraph Three: In the course and conduct of their business, respondents cause, and have caused, their paint products to be transferred from their factories in Florida, New Jersey and Texas to Mary Carter paint stores and franchise dealers located in various other States of the United States, where said products are sold at retail. Said respondents thereby maintain, and at all times mentioned herein have maintained, a substantial course of trade in said paint products in commerce, as "commerce" is defined in the Federal Trade Commission Act. [fol. 8] Paragraph Four: Respondents advertise, and have caused to be advertised, their paints in various newspapers and periodicals of general circulation, and by commercial announcements over the radio and television across state lines. Among and typical, but not all inclusive, of the statements contained in such advertisements are the following:

"Buy only Half the Paint You Need."

"Every Second Can Free of Extra Cost."

"Let us show you how to save One Half on your paint costs."

"Buy 1 and get 1 Free."

"I am satisfied with pennies per gallon: . . . You buy only half the paint you need! . . . The rest is free of extra cost."

"These Mary Carter Paint Factories will be making free paint half the coming year."

"Anytime you can get enough paint to do the extra job, yet pay for only half as much as you need, you're really practicing economy."

"On all paint every Second can Free, gallon or quart No limit. . . ."

"Buy a gallon—get a gallon Buy a quart—get a quart."

"How is the Free gallon possible?"

[fol. 9] "I can manufacture high quality paint at low cost because of operational economies and because I'm satisfied with a modest profit! Middleman eliminated

by direct factory-to-store shipments . . . modern paint factories and equipment . . . streamlined merchandising methods. My own fleet of diesel trucks to cut raw materials and shipping costs . . . All of these effect savings which I pass on to you with every 2nd can of paint free of extra cost."

"Why Not Just Charge Half Price? My paints are quality priced because they are quality paints, and I refuse to 'second rate' them with low unrealistic price tags. I'll never classify Mary Carter with cheap imitations being offered, nor will I ever downgrade my products with price reductions, discounts or special sales. I manufacture high quality paint and dramatize my operation economies with every 2nd can free of extra cost."

"Acrylic Rol-Latex \$2.25 Quart \$6.98 Gallon Every 2nd Can Free of Extra Cost."

"Liquid Glass Outside Oil Paint, \$3.00 Quart \$8.98 Gallon Every 2nd Can Free of Extra Cost."

Paragraph Five: Through the use of said advertisements, and others similar thereto not specifically set out herein, respondents have represented, and do represent, directly or by implication, that the usual and customary retail price of each can of Mary Carter Paint is the price designated in the advertisement; that this advertised price is a factory price; and that if one can of Mary Carter Paint is purchased at the advertised price, a second can will be given "free", that is, as a [fol. 19] gift or gratuity without cost to the retail purchaser.

Paragraph Six: The aforesaid advertisements referred to in Paragraph Four are false, misleading and deceptive. In truth and in fact, the usual and customary retail price of each can of Mary Carter paint was not, and is not now, the price designated in the advertisements but was, and is now, substantially less than such price. The advertised prices were not, and are not now, the prices charged by the factory for said paint but were, and are now, substantially in excess thereof. The second can of paint was not, and is not now, "free", that is, was not, and is not now, given without cost to the retail purchaser since the purchaser paid the advertised price, which

was, and is now, the usual and regular retail selling price for two cans of Mary Carter paint.

Paragraph Seven: In the conduct of their business, at all times mentioned herein, respondents have been, and are now, in substantial competition, in commerce, with corporations, individuals and firms engaged in the sale of paint and related products of the same general kind and nature as that sold by respondents.

Paragraph Eight: The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief. As a consequence [fol. 11] thereof, substantial trade in commerce has been, and is being, unfairly diverted to respondents from their competitors and substantial injury has thereby been, and is being, done to competition in commerce.

Paragraph Nine: The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

Wherefore, The Premises Considered, the Federal Trade Commission, on this 15th day of February, 1961, issues its complaint against said respondents.

Notice

Notice is hereby given to each of the respondents hereinbefore named that the 18th day of April, A.D., 1961, at 10 o'clock is hereby fixed as the time and Federal Trade Commission Building, 6th & Pennsylvania Avenue, N. W., Washington, D. C. as the place when and where a hearing will be had before a hearing examiner of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be en-

tered requiring you to cease and desist from the violations of law charged in this complaint

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of [fol. 12] it upon you. Such answer shall contain a concise statement of the facts constituting the ground of defense and a specific admission, denial or explanation of each fact alleged in the complaint or, if respondents are without knowledge thereof, a statement to that effect.

If respondents elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that respondents admit all material allegations to be true. Such an answer shall constitute a waiver of hearing as to facts so alleged, and an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceedings shall be issued by the hearing examiner. In such answer respondents may, however, reserve the right to submit proposed findings and conclusions and the right to appeal under Section 3.22 of the Commission's Rules of Practice for Adjudicative Proceedings.

If any respondent elects to negotiate a consent order, it shall be done in accordance with Section 3.25 of the Commission's Rules of Practice.

Failure to file answer within the time above provided and failure to appear at the time and place fixed for hearing shall be deemed to authorize a hearing examiner, without further notice to respondents, to find the facts to be as alleged in the complaint, to conduct a hearing to determine the form of order, and thereafter to enter an initial decision containing such findings and order.

[fol. 13] In Witness Whereof, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary, and its official seal to be hereto affixed, at Washington, D. C., this 15th day of February, 1961.

By the Commission.

Robert M. Parrish, Secretary.

Order Designating Hearing Examiner;
 Order Extending Time to Answer, Postponing Hearing,
 and Designating place of Hearing;
 Omitted from the printed Record pursuant to Stipulation
 as to printing Record heretofore copied at page 1.

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BEFORE THE FEDERAL TRADE COMMISSION

ANSWER—Received April 26, 1961.

The respondents, Mary Carter Paint Co., John C. Miller, I. G. Davis and Robert Van Worp, Jr., by their attorneys, answering the complaint herein:

[fol. 14] Paragraph One: Admit the allegations of the first subparagraph of Paragraph One of the complaint, except allege that the correct name of the corporate respondent is Mary Carter Paint Co.

With respect to the second subparagraph of Paragraph One, admit that I. G. Davis is an officer of Mary Carter Paint Co. and that, as an officer, he cooperates in the formulating, directing and controlling of the corporation's policies, and deny the remaining allegations.

With respect to the third subparagraph of Paragraph One, admit that Robert Van Worp, Jr. was formerly an officer of respondent Mary Carter Paint Co. at which time he cooperated, as an officer, in formulating, directing and controlling the policies of said corporate respondent, and deny the remaining allegations.

Paragraph Two: With respect to Paragraph Two of the complaint, admit that respondent Mary Carter Paint Co. is engaged in the business of manufacturing, selling and distributing paint and related products to the public, under the label or trade name of "Mary Carter", through retail outlets and franchise dealers located in various States of the United States, and deny the remaining allegations.

Paragraph Three: With respect to Paragraph Three of the complaint, admit that in the conduct of its business respondent Mary Carter Paint Co. causes and has caused its paint products to be transferred from its factories in

Florida, New Jersey and Texas to its stores and franchise [fol. 15] dealers located in various States of the United States, where said products are sold at retail, and that respondent Mary Carter Paint Co. maintains and has maintained a substantial course of trade in paint products in commerce as "commerce" is defined in the Federal Trade Commission Act, and deny the remaining allegations.

Paragraph Four: With respect to Paragraph Four of the complaint, admit the allegations as to respondent Mary Carter Paint Co., except allege that the statements quoted therein are only partial excerpts from the advertisements published, and deny the allegations as to the other respondents.

Paragraph Five: Deny the allegations of Paragraph Five of the complaint, except admit that the usual and customary prices and terms of sale of Mary Carter paints are as described in the advertisements referred to in Paragraph Four of the complaint.

Paragraph Six: Deny the allegations in Paragraph Six of the complaint.

Paragraph Seven: With respect to Paragraph Seven of the complaint, admit the allegations as to the corporate respondent, and deny the allegations as to the other respondents.

Paragraph Eight: Deny the allegations of Paragraph Eight of the complaint.

Paragraph Nine: Deny the allegations of Paragraph Nine of the complaint.

[fol. 16]

First Defense

Paragraph Ten: The complaint does not allege facts constituting a violation of the Federal Trade Commission Act.

Second Defense

Paragraph Eleven: The acts, statements and practices of respondents are not unfair or deceptive acts in commerce, but are fair methods of competition in the market for retail paint.

Paragraph Twelve: The nature of the competitive paint market is such that in the absence of standard quality

grading of paint—which grading the corporate respondent herein advocates and has advocated—price has become in the public estimation a principal standard for quality comparison.

Paragraph Thirteen: It has been the practice and design of large national-brand paint companies, employing extensive advertising and public relations resources, acting through the National Paint, Varnish & Lacquer Association, to inculcate into the public mind the idea that the principal criterion of quality in paint is price. Attached hereto and made a part hereof as Exhibit A is a copy of a public relations firm's promotion piece illustrating the nature of the campaign to produce said public psychology.

Paragraph Fourteen: The respondent Mary Carter Paint Co. (hereinafter "Mary Carter") is a young, aggressive company attempting to compete both fairly and effectively in the market for retail paint.

[fol. 17] Paragraph 15: Mary Carter manufactures quality paints and its paint is of comparable quality to competitive paints priced at the same single-can price.

Paragraph Sixteen: By selling paint on the basis of "Second Can Free" Mary Carter is in fact and in truth giving the purchasers double value and its advertisements graphically and honestly describe that value.

Paragraph Seventeen: As a merchandiser of quality paint, Mary Carter is entitled to advertise and sell its paint in a manner which truly reflects its value without having to downgrade it in the public estimation by putting a single-can price on its products of half the price of competitive paints of comparable quality.

Paragraph Eighteen: The national-brand paint manufacturers and sellers, through the National Paint, Varnish & Lacquer Association, are attempting, by putting pressures on Better Business Bureaus, paint associations and advertising media, to prevent Mary Carter from competing with them fairly and effectively and to force Mary Carter to price and advertise its paint in such a way as to make Mary Carter a victim of the public psychology which they have created and to eliminate Mary Carter as a competitor and as a threat to their price structure for the retail sales of quality paint.

Paragraph Nineteen: The acts and practices of Mary

Carter Paint Co. benefit the public by providing increased competition in the sale of paint in the retail market and [fol. 18] by providing consumers with true quality paint value.

Wherefore the respondents pray that the complaint be dismissed.

Sullivan & Cromwell, by David W. Peck, a Partner,
Attorneys for Respondents, 48 Wall Street, New
York 5, New York.

Of Counsel: Joseph P. Tumulty, Jr., 1317 F Street, N.W.,
Washington 4, D. C.

Exhibit "A", Paint Publicity Stores; Omitted herewith,
being the same as Respondent's Exhibit 6 Id. copied in
Joint Record Vol. of Exhibits.

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Order Resuming Hearing;
Order Changing Date of Hearing;
Respondents' Brief;

Omitted from the printed Record pursuant to Stipulation as to printing Record heretofore copied at page 1.

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[fol. 19] BEFORE THE FEDERAL TRADE COMMISSION

RESPONDENTS' PROPOSED FINDINGS—September 1, 1961

The Respondents:

1. Mary Carter Paint Co., is a corporation organized and existing under the laws of the State of Delaware. Its corporate predecessor, Mary Carter Paint Factories, was a New Jersey corporation which was merged into Mary Carter Paint Co. on October 30, 1960. (CX 59; RX 2, tr. 69.)

The term "Mary Carter" will be used herein to refer to Mary Carter Paint Co. and, where reference is made to the period prior to October 30, 1960, to its corporate predecessor, Mary Carter Paint Factories.

2. Mary Carter's principal place of business is located at Gunn Highway and Henderson Road, Tampa, Florida. It also maintains offices at 666 Fifth Avenue, New York, New York, and Mary Carter paint manufacturing plants are located at Matawan, New Jersey; Conroe, Texas; and Chino, California. (CX 56, 59; RX 2; tr. 46.)

3. The individual respondents are I. G. Davis, Jr., presently an officer and director of Mary Carter; Robert Van Worp, Jr., formerly an officer and director of Mary Carter; and John C. Miller, formerly an officer and director, and now a director of Mary Carter. Mary Carter is a publicly held corporation whose securities are traded in the over-the-counter market; none of the individual respondents had or have a controlling stock interest in Mary Carter. As officers, subject to the Corporation's Board of Directors, the individual respondents have cooperated in for-[fol. 20] mulating and directing Mary Carter policies. (CX 2, 55, 56; tr. 42, 57, 59-61.)

The Business of Mary Carter:

4. Mary Carter is engaged in the business of manufacturing, selling and distributing paint and related products, under the trade name of "Mary Carter", to the public through retail outlets (company stores and franchise dealer stores) located in various states of the United States. As of September 15, 1960, Mary Carter marketed paint through 505 retail outlets, 433 of which were operated by franchise dealers and 72 of which were company stores. (CX 59, tr. 31.)

5. Mary Carter maintains a substantial course of trade in paint products in commerce as "commerce" is defined in the Federal Trade Commission Act. For the years 1955 through 1960 Mary Carter's net sales were as follows: (CX 55, 56; tr. 27-28):

1955	\$ 1,300,000
1956	2,200,000
1957	3,700,000
1958	5,400,000
1959	8,400,000
1960	12,400,000

Mary Carter's Advertising and Merchandising:

6. Mary Carter advertises its paints in newspapers, national periodicals of general circulation, commercial announcements over radio and television, and on permanent signs posted on the premises of Mary Carter retail outlets. All Mary Carter advertising must be approved by officers of the company, and the company pays 50% of all the advertising costs which its retail outlets undertake. (CX [fol. 21] 57, 58, 61 A, B; tr. 44-45, 49-50.)

7. It has, over the years, been the basic business policy of Mary Carter to manufacture and sell paint of high quality at a net cost to the consuming purchaser of half as much as he would pay for paint of comparable quality manufactured by leading national brand companies. (CX 55(2), 56(9), 59(6); tr. 141-45, 281.)

This policy of giving "double value," is carried out in a merchandising practice of pricing a can of Mary Carter paint at a price comparable to national brand prices for comparable quality paint, and advertising and giving the purchaser a "second can free of extra cost" or "second can free." (IBID; tr. 156.)

Respondents offered evidence that Mary Carter paint, can for can, is as good or better than the paints marketed under leading national brand names at a comparable single can price. This evidence was excluded by ruling of the Hearing Examiner on objection made by counsel for the Commission that the complaint did not raise any question of quality and that quality was not an issue in the case. The evidence was taken for reporting, however, and it is uncontradicted to the effect that Mary Carter paints are as good or better than the paints marketed under leading national brand names at a comparable single can price. (excl: RX 7, 8, 9, 15, 16, 17, 18, 19, 20, 21; tr. 157-76, 186-224, 243-267.)

8. The Mary Carter advertisements make clear the prices, terms and conditions of sale of Mary Carter paints. [fol. 22] Its advertisements (newspapers, magazines, radio, television, store signs, lithographed can tops, truck sides, etc.) consistently and constantly present the sales theme of "every second can free of extra cost" or "every second

can free." All of the conditions, obligations, or prerequisite to the receipt and retention of the "free" article are clearly and conspicuously set forth in the advertising so as to leave no reasonable probability that the terms of the advertisement or offer might be misunderstood. (CX 1-54; R 4, 5, 23; tr. 45-46, 151-54).

9. The single can price of Mary Carter paint is the advertised price (typically, \$2.25 a quart, \$6.98 a gallon) and the only price at which a single can may be purchased. With the purchase of each can the purchaser is entitled to get, without additional cost, a second can of Mary Carter paint priced at the same or a lower price. Naturally, the purchaser will usually take the second can, but this is optional with him; at times he takes only the single can and the price paid is the same single can price. (CX 10A, 52; tr. 49, 58, 70-72, 74-77, 154-56, 190-91, 285-88.)

Although counsel for the Commission introduced the testimony of one witness (a representative of a Mary Carter competitor), that he was able to persuade a salesman in a Mary Carter store to sell a gallon can of Mary Carter paint at \$4.50 with a sales slip showing a sale of two quarts of Mary Carter paint at \$2.25 a quart and two quarts free, it is clear from the circumstances of the sale that it was unauthorized and a violation of firm company policy not to sell a can of Mary Carter paint at less than the advertised price. (tr. 85-95, 102-06, 116-17, 287-88.) [fol. 23] The Company has taken all reasonable steps, through indoctrination of employees, provisions of its contract with franchised dealers, memoranda to dealers and employees, supervision by regional supervisors and store checks, and termination of employment or dealerships in cases of infractions, to enforce its pricing policy of selling a single can of paint only at the advertised price and giving a second can free of extra cost. (CX 66, 67, 68; RX 1; tr. 49, 58, 70-72, 74-77, 154-56, 190-91, 285-88.)

10. No evidence was introduced by counsel for the Commission to support the allegation of the complaint that Mary Carter advertises the price of its paint as a "factory price." The term "factory price" did not enter into the evidence. In point of fact, numerous Mary Carter advertisements explain that its paint is "quality priced" and that it will not be "second-rated" with a low price tag. The only men-

tion of "factory" in Mary Carter advertising is the statement that among the operational economies of Mary Carter is its "factory-to-store shipments" which eliminate the "middleman." Jobbers or wholesalers are not employed in Mary Carter merchandising and Mary Carter paints are distributed exclusively by Mary Carter's own trucks directly from manufacturing plants to company and franchise stores. The retail price for any Mary Carter paint is one price and the same at plants, company stores or franchise stores. (CX 1, 2, 3, 4, 6, 7, 8, 47, 51, 54; tr. 142-43; 176, 184.)

11. No direct evidence was introduced to show deception of any purchaser by Mary Carter advertising or to articulate how a purchaser might be deceived by Mary Carter [fol. 24] advertising. There was no attempt by Commission counsel to evidence consumer attitudes or understandings with respect to the use of "free" generally, or in the case of the particular Mary Carter offer. The evidence did show, however, that the Mary Carter sales program is aimed at the cultivation of repeat customers, as well as new customers, and that the business has been successful over the years in steadily increasing sales and satisfying customers. (CX 55, 56, 59; RX 2, 3 (excl.); tr. 138-42, 145-46, 254-55, 262, 271, 175-76.)

Proposed Findings With Respect To Excluded Evidence Taken For Reporting

12. Evidence of the high quality of Mary Carter paint was proffered and presented in the detailed testimony of Alfred Driscoll, a paint consultant, qualified as a paint and testing expert. He conducted over twenty different tests (in general, performance tests covering every practical quality of significance to a paint user) on each of five competitive brands of paint in five different categories. Tests were conducted on the first quality paints of Mary Carter, DuPont, Sherwin-Williams, Pittsburgh and Glidden for the following categories: interior latex, exterior latex, exterior white house paint, exterior colored enamel, and white enamel; except that there was no test conducted on Pittsburgh exterior latex. The paints were coded and the test evaluation was done without knowledge on the part of Mr. Driscoll, the evaluator, as to the names of brands of paint about which he was stating his conclusions. The

tests showed Mary Carter to be equal to or better than [fol. 25] comparable, similarly priced, top-quality national brand paints. (excl.: RX 7, 8, 9, 10, 13, 14; tr. 186-237, 239-43.)

13. Further evidence of the high quality Mary Carter paint was proffered and shown through detailed testimony and documentary materials including evidence of:

(a) thorough-going quality controls at every stage of the production process (including use of certified first-quality raw materials, analytical checks of raw materials, IN SITU tests of the physical properties of each production batch, and continued and comprehensive physical, performance, and comparison tests, conducted in the Mary Carter laboratory on each finished production batch; (excl.: RX 15, 16, 17, 18, 20; tr. 247-53, 173-75.)

(b) a report of comprehensive performance tests conducted over a four-month period by Mary Carter laboratory technicians on a full line of the first-quality paints of Mary Carter, DuPont, Sherwin-Williams, and Sears Roebuck, all the paints being coded for testing purposes and the total results being evaluated according to an evaluation scale in which numerical values were assigned according to the relative importance of the qualities tested; Mary Carter paint was shown to be of a high quality comparable to that of the other paints tested in each of the categories and its over-all total numerical score, according to the pre-assigned evaluation scale, was the best of the four brands; (excl.: RX 19; tr. 255-62).

(c) the low volume of consumer complaints—below the level of the industry; (excl.: tr. 146, 254-55).

[fol. 26] (d) consumer acceptance as demonstrated over the years by increased sales, repeat sales, and by a consumer preference survey; (CX 55, 56, 59; RX 3 (excl.); 138-42, 262, 271).

(e) the award of the Good Housekeeping Seal (given after that organization's technical investigator had conducted a detailed study of Mary Carter quality controls, competitive tests, and actual consumer results); (excl.: RX 22; tr. 266-69).

(f) the award of the American Hotel Association Seal (certifying Mary Carter paint for use by all member hotels

and motels), given on the basis of standard performance tests, conducted by Foster D. Snell Laboratories, a recognized independent scientific testing laboratory, which test results were similar to and consistent with the results of the tests conducted by the Alfred Driscoll Laboratory and those conducted by the Mary Carter technicians; (excl: RX 21; tr. 262-66) and

(g) testimony that, when challenged, paint associations and better business bureaus retracted all statements directed at disparaging the high quality of Mary Carter paints. (excl: tr. 175-76.)

14. Commission counsel offered no evidence that the quality of Mary Carter paint was other than as advertised, and made no proffer of proof in opposition to the proffer of proof by Mary Carter. Commission counsel cross-examined Mary Carter witnesses with respect to their testimony on the high quality of Mary Carter paint; that cross examination demonstrated no inconsistencies or weaknesses in the testimony or documentation. (excl: tr. 224-37, 274-77.)

[fol. 27] 15. The affirmative evidence proffered by Mary Carter demonstrated conclusively that the value of its paint was as advertised. The proof tendered by Mary Carter showed beyond doubt that the Company has given and is giving the consumer double value; and the use of the advertising and merchandising theme of "every second can free" constitutes a fair and honest representation of that value.

Conclusion

As hereinbefore found, the respondents have not engaged in unfair methods of competition or unfair or deceptive acts or practices in commerce, and, accordingly, the complaint should be dismissed.

September 1, 1961.

Respectfully submitted, Sullivan & Cromwell, Attorneys for Respondents, 48 Wall Street, New York 5, N. Y.

Of Counsel: David W. Peck, Richard Sexton, 48 Wall Street, New York, N. Y. Joseph P. Tumulty, Jr., 1317 F Street, N.W., Washington, D. C.

[fol. 28] Proposed Findings, Conclusions and Order;
 Brief of the Law and Evidence Supporting the Proposed Findings, Conclusions and Order;
 Assignment of Room for Oral Argument;
 Order Canceling Oral Argument;
 Respondents' Reply Brief;
 Omitted from the printed Record pursuant to Stipulation as to printing Record heretofore copied at page 1.

* * * * *

BEFORE THE FEDERAL TRADE COMMISSION

INITIAL DECISION—Received October 26, 1961.

By Herman Tocker, Hearing Examiner.

Garland S. Ferguson, for the Commission.

Sullivan & Cromwell, by David W. Peck, Richard Sexton, of New York, New York, and Joseph P. Tumulty, Jr., of Washington, D. C., for the Respondents.

The Federal Trade Commission has charged the respondents in this proceeding with engaging in false and deceptive practices arising mainly from the use of the word "free" [fol. 29] in the advertising of paint products offered for sale. The complaint was issued February 15, 1961, and alleges that these practices are in violation of the Federal Trade Commission Act because they constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of that Act. Although the corporate respondent is named in the complaint as Mary Carter Paint Company, Inc., its correct name is Mary Carter Paint Co. The case has been litigated in this form and, for the purposes of this proceeding, it may be regarded as being brought against Mary Carter Paint Co. and the individuals named. All the respondents appeared herein and filed an answer to which reference will be made below.

The advertising to which reference is made in the complaint is conceded to be that of the corporate respondent (to which reference may be made from time to time as

Mary Carter and which, for the purpose of this proceeding, may be deemed to include its predecessor or predecessors in the paint business). The complaint charges that this advertising is false and deceptive and Mary Carter says it is not.

Typical are the following quotations from advertisements which appear repeatedly and consistently in newspapers and on the radio or television:

"Buy only Half the Paint You Need."

"Every Second Can Free of Extra Cost."

"Let us show you how to save One Half on your paint costs."

"Buy 1 and get 1 Free."

[fol. 30] "I am satisfied with pennies per gallon. . . . You buy only half the paint you need! . . . The rest is free of extra cost."

"These Mary Carter Paint Factories will be making free paint half the coming year."

"Anytime you can get enough paint to do the extra job, yet pay for only half as much as you need, you're really practicing economy."

"On all paint every Second can Free, gallon or quart No limit . . ."

"Buy a gallon—get a gallon Buy a quart—get a quart."

"How is the Free gallon possible?"

"I can manufacture high quality paint at low cost because of operational economies and because I'm satisfied with a modest profit. Middleman eliminated by direct factory-to-store shipments . . . modern paint factories and equipment . . . streamlined merchandising methods. My own fleet of diesel trucks to cut raw materials and shipping costs . . . All of these effect savings which I pass on to you with every 2nd can of paint free of extra cost."

"Why Not Just Charge Half Price? My paints are quality priced because they are quality paints, and I refuse to 'second rate' them with low unrealistic price tags. I'll never classify Mary Carter Paints with cheap imitations being offered, nor will I ever down-grade my products with [fol. 31] price reductions, discounts or special sales. I manufacture high quality paint and dramatize my operation economies with every 2nd can free of extra cost!"

"Acrylic Rol-Latex \$2.25 Quart \$6.98 Gallon Every 2nd Can Free Of Extra Cost."

"Liquid Glass Outside Oil Paint \$3.00 Quart \$8.98 Gallon Every 2nd Can Free Of Extra Cost."

It is clear that the attack is mainly on the use of the word "free," but the complaint alleges also that Mary Carter represents that purchasers of its paint acquire it at factory prices when such is not the fact.

Respondents freely concede that the method of advertising, using the word "free," in the manner shown, is Mary Carter's permanent, established policy and that this policy is accountable for its spectacular growth. Indicative of its growth is the rise of its sales from just over \$2,000,000 in 1956 to more than \$12,000,000 in 1960. Basically, their position is (a) that there has been built up in the minds of the public by the large national brand paint companies, and the national trade association, the idea that quality of paint is to be judged by price; and (b) that since Mary Carter paint is of a quality comparable to the best paints of the industry, it very properly prices its paint at prices similar to the prices of such other paints and it distinguishes itself from the other manufacturers by passing on to consumers savings which it realizes in the manufacturing and distribution processes by giving to its customers a second can of paint free and without cost with each purchase of a first can. Since, under the theory thus espoused, price has become the standard of value in the [fol. 32] paint industry, it contends it has every right to establish its prices at figures equivalent to the prices fixed for what it claims to be comparable paints. It says that if it were to place a lower price on its paints, this, in effect, would make it appear that its paints are not as good as the higher priced paints. However, since it wants to pass on to Mary Carter customers a part of the savings which it achieves, it does so by giving its customers the so-called "free" can of paint. It asserts that this practice, contrary to being against the public interest does in fact benefit the public by providing increased competition in the business and by providing consumers with true quality paint value.

Respondents contend also that, in any event, the individuals who have been charged are not such participants in the practices alleged as to justify their inclusion as

respondents in this proceeding. Motions have been made to dismiss as to them. After consideration of all the evidence presented and the facts and nature of this case, it is my conclusion that neither Miller nor Davis ought to be made parties to any remedial action, if any be taken herein. Miller, although formerly an officer, was brought into the company as a result of a series of mergers and his identification with the particular practices which are involved herein is only incidental thereto. Similarly, Davis was brought into the company only late in 1960 and, to the extent that he may be connected with the practices involved herein, it can be said only that he acquired that connection by reason of having become president in December 1960. The company is a large publicly-owned corporation and his mere holding of the executive office does not justify his [fol. 33] being charged with responsibility for the ancient practice involved herein. The motions to dismiss as to Miller and Davis will be granted. *Book of the Month Club, Inc., et al.*, 48 F.T.C. 1297, at 1308. However, the motion to dismiss as to Robert Van Worp, Jr. is denied. He and his father always have been identified intimately with the practices herein under attack. He has been with the venture since its inception. He has been vice-president and president, and is now a consultant to the Board of Directors. There is no reason to conclude that if remedial action be necessary, such remedial action should not be taken against him as an individual in addition to that taken against the corporation.

We are confronted squarely in this proceeding with a policy statement issued by the Federal Trade Commission on December 3, 1953, as follows:

In connection with the sale, offering for sale, or distribution of industry products, it is an unfair trade practice to use the word "free," or any other word or words of similar import, in advertisements or in other offers to the public, as descriptive of an article of merchandise, or service, which is not an unconditional gift, under the following circumstances:

- (1) When all the conditions, obligations, or other prerequisites to the receipt and retention of the "free" article of merchandise or service offered are not clearly and conspicuously set forth at the outset so as to leave no reason-

able probability that the terms of the offer will be misunderstood; and, regardless of such disclosure:

[fol. 34] (2) When, with respect to any article of merchandise required to be purchased in order to obtain the "free" article or service, the offerer (a) increases the ordinary and usual price of such article of merchandise, or (b) reduces its quality, or (c) reduces the quantity or size thereof.

(Note: The disclosure required by subsection (1) of this rule shall appear in close conjunction with the word "free" (or other word or words of similar import) whenever such word first appears in each advertisement or offer. A disclosure in the form of a footnote, to which reference is made by use of an asterisk or other symbol placed next to the word "free," will not be regarded as compliance.)¹

The respondents rely most strongly on this statement. They contend that the advertising which is the subject matter of this proceeding is completely sanctioned by it. If what respondents say is so, a hearing examiner has no alternative but to dismiss the complaint.

To say that every Second can is free of Extra cost, leaves little doubt that payment must be made for the first can. The same is true of an advertisement saying, "Buy 1 and get 1 Free," and possibly for "You Buy only half the paint you need! . . . The rest is free of Extra cost," and so on. (Emphasis mine.) It is only a short step from statements like these to statements like "These Mary Carter Paint Factories will be making free paint half the coming year" [fol. 35] or "Anytime you can get enough paint to do the extra job, yet for only half as much as you need, you're really practicing economy."

The fact that one can must be purchased and paid for

¹ In promulgating this policy decision, the Commission was not like Humpty-Dumpty. It did not take the position that the word "free" had to have a definite unrealistic meaning which it chose to adopt, "neither more nor less." ("When I use a word," Humpty-Dumpty said, "it means just what I choose it to mean—neither more nor less." Chap. 6, *Through the Looking-Glass and What Alice Found There*, Lewis Carroll.)

before getting the second can "free" is always set forth somewhere in the advertising. However, even though the statement, as a Grouping of Words, says that payment always must be made for one can before a second can may be obtained without additional payment, the Visual presentation is not clear. The emphasis is not as I have written above. On the contrary, the word "free" invariably jumps out from the advertisement because it is in larger letters, bolder type or more strategically placed than the words of qualification. In addition to this, some of the advertisements have lead or banner material which presents a puzzling or a definitely misleading approach. About one-fourth of one, in big letters, three lines, says:

"Why Give a Free Can of Paint? Why Not Just Charge Half Price?"

The picture which catches the eye here is:

"Free Paint Half Price."

Television announcements start off, "Now, take advantage of Mary Carter's famous free paint offer."

A mat for a columnar advertisement is in evidence. It is thirteen inches long. The top $2\frac{1}{4}$ inches is a box which is at least half covered with the word "Free," the words [fol. 36] below it being "Paint" and "Offer," so that the message is:

"Free Paint Offer."

The bottom of this thirteen-inch column is another box, $2\frac{1}{2}$ inches. Again, the dominant word is "Free," more than three-fourths of an inch high. The legend is:

"Every 2nd can Free of extra cost Mary Carter Paint Factories."

The smallest letters are "of extra cost."

One card, although offered as a separate exhibit, is really one of a group of three television display cards. The No. 1 card contains the legend:

"Every 2nd Can Free of extra cost Mary Carter Paint Factories."

The No. 2 card presents a square effect with four cans of paint forming a diagonal from lower left corner to upper

right corner. In the upper left quadrant are the words "Five Million Free Gallons" and in the lower right quadrant the words "Mary Carter Paint Factories." The No. 3 card just shows two cans of paint. The effect presented is the emphasis on "Free" in the first card with the words "of extra cost" played down and this is followed with a card which howls "Five Million Free Gallons," and is wholly unqualified.

Another exhibit is a three-column advertisement about fifteen inches in length. The first two inches are "Why [fol. 37] give a Free can of Paint?" After a one-half inch space, the next line is "Why Not Just Charge" and the next line in large capital letters is "Half Price?" It is not until $5\frac{1}{4}$ inches down on the page, after an intervening text of ten lines in much smaller type and containing long narrative statements, that the disclosure is made that a sale is tied into the availability of a second can of paint, "It would be easy to cut the price in half for a single gallon, instead of giving a second can free with every one I sell, . . ." Squarely in the middle of this advertisement are two lines in bold, black, large print:

"My Unique Operational Economies Make My Free Paint Offer Possible!"

Qualification, if any there be, of the words "Free" in this advertisement, is wholly lost to any but the keen and thorough reader.

I am not sure that I read CX 51 in the same manner as does Commission counsel. It shows three paint factories above which are the words, "These Mary Carter Paint Factories" and below which, in big, bold, black, block letters are the words, "Will Be Making Free Paint Half the Coming Year!" The legend surely presents a picture of a large company making paint for free distribution. This is followed by the smaller print, "Hard to believe? Well, it's true! For six months of the coming year, every one of my three paint factories will be working full time turning out Free Paint for you! That's because, with every can of paint I sell in the next 12 months, I'll be giving a second can away free of extra cost." Thus far, the only change from the banner head is that now it appears that [fol. 38] every time Mary Carter sells a can of paint it

will set aside one can for free distribution. Not until the last sentence in the next smaller print paragraph does it come out that the free can is reserved only for the Buyer of the first can. The rest of the advertisement is the typical Mary Carter "Every 2nd Can Free" theme but there are two large boxes just below its center. The left box, above 12 lines of fine print, has the two line black print question, "How Is The Free Gallon Possible?" and a similar right side box, the legend "Why Not Just Charge Half Price!"

Mary Carter's advertising copy writers have been caught up in the rhythm of this word "free" to the point where, not content with using the name Mary Carter for the company name, they have represented her as a real person who is sometimes the company and sometimes a part of it. She engages in disputes with the company's Board of Directors, always prevailing upon them not to abandon the distribution of the so-called "free" can. Thus, one of the exhibits is a copy of an advertisement containing a picture of a lady, presumably Mary Carter, in the upper lefthand corner and, to the right and partially under this picture, a picture of five men, presumably the Board of Directors, sitting around a board table. She is quoted as telling the Board of Directors "Positively no" in response to their annually recurring Spring idea of terminating the "second can free policy . . . [to] . . . cut up a bigger profit for ourselves!" Her response to that is said to be invariably "No" and she assures the consuming public that, as long as she is able to outtalk the Board members ["(and being a woman gives me an edge in that department!)"], the buyer always will be able to get the second can free in a [fol. 39] Mary Carter store. The truth is, there is no Mary Carter in the Company and there never was!

In these days of visual, video and audio impact, words in the abstract do not constitute the offer. It cannot be said that "all of the conditions . . . are . . . clearly and conspicuously explained or set forth at the Outset so as to leave no reasonable probability that the terms of the offer will be misunderstood. This criterion is in the first half of the policy statement.

The second half of the policy statement cannot absolve a vendor if he contravenes the first half. Since it has been injected into this proceeding some discussion may be ap-

appropriate. Under the second half, questions of fact are created as to whether the ordinary and usual price has been increased, whether quality has been reduced or whether quantity or size has been reduced. These questions of fact do not take care of all situations which may arise in connection with a "free" offer. The reason for this stems from the manner in which the policy statement came to be evolved.

The policy statement was evolved in, and in connection with, the disposition of the Commission's complaint against Walter J. Black, Inc. (The Classics Club and Detective Book Club), F.T.C. Docket 5571, decided September 11, 1953, 50 F.T.C. Dec's 225. Unfortunately, Black, although an adversary proceeding, was decided on the basis of a stipulation of facts entered into between Black's attorney and counsel there supporting the complaint. No hearing was held and no witnesses were submitted by either of the parties. Black had offered, in connection with the sale of a series of books known as The Classics, two books characterized as "free"—a copy of the Iliad of Homer and a copy of the Odyssey of Homer. It was clear from the offer that the books were to be given free only if the recipient became a trial member of "The Classics Club." In order to become a trial member, it appeared to be necessary to purchase a first book. Black had also another book club called the "Detective Book Club." The sales device for that club was to give "free" to new members a three-volume book of detective fiction as a "Charter Membership Gift." The Classics Club did not obligate the trial member to take any particular number of books after buying the first one, but the Detective Book Club at first obligated the member to "take as few as four during" the twelve months following his becoming a member. The Detective Book Club offer was varied later in that it seemed to require only purchase of the current triple volume as distinguished from the prior obligation to make four purchases. The stipulation "included a statement to the effect that [Black] made no effort to collect for the so-called 'free' books or to obtain the return of same when the subscriber failed to carry out the other provisions of his contract." These were the matters before the Commission when it decided Black. It is difficult, therefore, to attempt to apply the facts of this

Mary Carter case to the second half of the policy statement thus enunciated by the Commission.²

As pointed out by the respondents here, the policy statement does not take into consideration the possibility of a newcomer to a market giving anything as a free gift since there is no way (set forth in the statement) to determine [fol. 41] whether the ordinary and usual price of "such" article was increased or whether its quality was reduced or whether its quantity or size was reduced. Respondents seek to supply this deficiency by referring to the Guides against Deceptive Pricing adopted October 2, 1958 ("Part V. Two For One Sales"). There the Commission recognizes that a vendor may not previously have sold a particular article or articles and in such case it provides that the propriety of the advertised price shall be "determined by the usual and customary retail price of the single article in the trade area, or areas, where the claim is made." I am in agreement with respondents when they say that a newcomer in any business should not be deprived of any benefit of the Black rule and that he should be permitted to make a Free offer of merchandise identical with his new product in connection with the sale of that product. (In this I would not be inclined to rely on Schaintuck, 23 F.T.C. 151, because that too was decided on the basis of a stipulation.)

Of course, this could not be done within the rule of the policy statement on "free" if there is no compliance with its first half. But, let us assume a case of compliance with that first half. Then I would rule that the very argument on which respondents rely so strongly (that Mary Carter's offer always has been the same, that it will not be withdrawn), is fatal to their defense of this proceeding. Black had no cause to decide this situation and Book of The Month, 48 F.T.C. 1297, 50 F.T.C. 778, is distinguishable. Black decided only that the offer was valid for new members. I am sure that Black would not have permitted John Doe to become a member, get his free books, quit, join again and get more free books, quit and join Ad

² Can anyone suggest that the buyer of a can of Marv Carter paint may return it, get his money back and still keep the "free" can?

[fol. 42] Infinitum. Yet, this is what Mary Carter permits in effect. While Book of the Month was a continuing offer in that a "book dividend was given for every two books purchased, the decision as to what books were to become available for book dividends always remained with the Club and subscribers were limited to select from them. In our case, the published offer implies that double quantity of any particular paint always will be given for the list price per single can. We are told, however, that a buyer may elect to take Any Mary Carter product, Priced up to the price of the purchased can, as his free article. Articles manufactured by others and purchased for sale by Mary Carter are specifically excluded. This leads to two conclusions—the first that the list prices of Mary Carter's Own products are increased to a point to make possible the apparently free gift tied into any purchase, and the second that the list price, the price for which any particular can is sold and required to be purchased, is not the true price per can but the price for two cans. Thus, there never is a free can of paint. It is always two cans for the price specified. Even if the offer had been permissible under the "newcomer" rule, by lapse of time the Practice would have lost its character of providing a Free article incidental to a purchase and would have merged into a "two for \$X" pricing arrangement, not a "two for the price of one" arrangement. (Conceivably there could be a question of fact as to what lapse of time is necessary to result in such a merger but the question cannot survive all the years during which Mary Carter has engaged in this practice.)

To the extent indicated thus far in this decision and, subject to my dismissal of the complaint as against respondents Miller and Davis, the complaint will be sustained. [fol. 43] The conditions of the "free" offer are not clearly and conspicuously explained at the outset. The unit of sale is two cans.

This does not, however, dispose of all the issues. It still remains to be decided whether Mary Carter advertised the price of the paint as "a factory price" and whether, if it did so advertise, there was a false representation. While the advertising refers frequently to economies effected because of the mass production, great volume, mod-

ern methods of manufacture, elimination of the middleman (which I interpret as meaning the wholesaler or distributor), lessened or no freight costs, the sale in its own stores or in the stores of franchised dealers, and was subscribed, "Mary Carter Paint Factories."^{*} I find nothing in the advertising from which I would conclude, As a Matter of Law, that any representation was made that the paint was being sold at Factory Prices. I do not interpret the words, Factory Price, as meaning anything but the price at which a factory might sell a commodity to a purchaser who comes to its door, there to make his purchase. There is nothing in the advertising suggesting that this is the method of sale. If Factory Price (which is a term used by Commission counsel and not by respondents) has some special meaning, or perhaps a meaning other than the meaning I ascribe to it, it seems to me that such a meaning ought to be brought out by evidence. For this reason, to the extent that the complaint alleges a deceptive practice involving alleged representations of sales at factory prices, it will be dismissed.

[fol. 44] Report of Excluded Testimony and Rulings on Respondents' Requests to Find

Frequently, during the course of the proceeding and in the briefs submitted subsequent thereto, respondents have complained that they are sought to be made victims of a campaign against them by the large national paint manufacturers and the National Paint, Varnish & Lacquer Association. That is irrelevant to the issues in this proceeding. If Mary Carter has indeed been injured by the practices and campaign of which it complains, it has its remedy and this is not the forum in which to pursue it. *Advance Music Corporation v. American Tobacco Co.*, 296 N.Y. 79.

The claim is that Mary Carter paint is top quality and equivalent to the paints vended by the large paint manufacturers; therefore, respondents say they have the right to price it at prices equivalent to the prices charged by the manufacturers of equivalent and competitive paints; consequently, any additional can, that is to say, the second

^{*}This was the name of the corporate respondent's predecessor and was not a false characterization.

can, is in fact free. On the basis of both the position asserted by Commission counsel and my interpretation of the complaint, I ruled that quality is not an issue; if in fact the advertising ascribed to the respondents is false, then the paint vended by them could be of the best quality in the world and it would make no difference. On the basis of that ruling, I excluded all evidence offered for the purpose of proving quality but, in conformance to the Rules of Procedure, I took, for the purpose of reporting, the evidence so offered. That evidence has been transcribed. The exhibits proffered have been preserved. Everything is available for consideration by the Commission. Since all that [fol. 45] has been offered is condensed into the requests to find submitted on behalf of the respondents, those proposals and my rulings thereon ought to be sufficient for adequate consideration by the Commission. Also, in ruling on respondents' proposed findings, while I indicate many of them as being "found," I do not deem it necessary to adopt them as my findings hereinafter to be set forth.

Requests 1, 2, 4, 5 and 6 could be found as supported by the evidence.

I could find Request 3, but would eliminate the words "none of the individual respondents had or have a controlling stock interest in Mary Carter."

Request 7: I would substitute in the first line for the words "It has, over the years," the words "Respondents contend that, over the years, it has". I would delete the words "of giving 'double value'" and would insert in the third line of the second paragraph of this request the words, "which it claims is," after the word, "price." Also in that paragraph, I would change the last clause to read: "and it, therefore, advertises that it gives the purchaser a 'second can free of extra cost' or 'second can free.'" I would change the last sentence in the last paragraph of this request to read: "The evidence was taken for reporting, however, and had it been received and litigated, if not rebutted by substantial evidence, would have been accepted as demonstrating that Mary Carter paints are as good or better than paints marketed under leading national brand names at comparable single can prices."

[fol. 46] Request 8: I would use the word "state" instead of the words "make clear" in the first line. In place of

the entire last sentence of this request, I would substitute "Only after analysis and complete reading of the advertising can it be ascertained that the second can of paint is 'free' only in conjunction with, or conditioned upon, the purchase of the first can."

Request 9: I would rewrite this request as follows: "The claimed single can price of Mary Carter paint is the advertised price (typically, \$2.25 a quart, \$6.98 a gallon). While it is generally the only price at which a single can is offered for sale, it is inherent in the entire transaction that the purchaser is entitled to get, as an incident of the purchase, a second can of Mary Carter paint bearing the same or a lower advertised can price."

"Counsel for the Commission introduced the testimony of one witness (a representative of a Mary Carter competitor), that he was able to persuade a salesman in a Mary Carter store to sell a gallon can of Mary Carter paint at \$4.50 with a sales slip showing a sale of two quarts of Mary Carter paint at \$2.25 a quart and two quarts free. It is clear from the circumstances of the sale that much persuasion was required to induce the sale in this manner but the Hearing Examiner is unable to say that it was unauthorized and a violation of firm company policy not to sell a can of Mary Carter paint at less than the advertised price in view of the testimony in the Municipal Court of the City of Miami, Dade County, Florida, and the company practice of providing can labels to dealers and retail outlets."

[fol. 47] I would strike the entire last paragraph of this request.

Requests 10 and 11 are denied.

All rulings with respect to requests which are adverse thereto are made because the portions not accepted and those rejected are irrelevant, immaterial, not supported by the evidence or argumentative.

Rulings on the Requests Based on the Excluded Evidence

The following rulings are made only in response to the requirement that I report the excluded testimony. The Findings, It Should Be Noted Clearly, Are Not My Findings.

Request 12: I would change the last sentence to read: "His tests (in the absence of evidence litigiously offered in opposition thereto) showed Mary Carter to be equal to or better than comparable, similarly-priced, top-quality national brand paints."

Request 13: I would eliminate the word "high" in the first paragraph, the word "thorough-going" in subparagraph (a), the word "comprehensive" in the first line of subparagraph (b) and I would change the last portion of subparagraph (b) following its next to the last semicolon to read: "Mary Carter paint, in the absense of evidence litigiously offered in opposition thereto, appeared to be of a high quality comparable to that of the other paints tested in each of the categories and its over-all total numerical score (subject to being litigated), according to the pre-assigned evaluation scale, was reported as being the [fol. 48] best of the four brands." In subparagraph (f), I would eliminate the words "recognized independent." I would reject entirely subparagraph (g).

Requests 14 and 15: I would reject both of these as not being properly the subject of findings but rather the subject of argument.

As important question in this case is whether the order to be entered herein should follow the form of the order proposed by counsel supporting the complaint or whether it should be more in the form suggested by the second Book of the Month decision, 50 F.T.C. 778, at 782. After careful consideration of the manner in which the advertisements involved herein have been composed, it is my conclusion that the order should follow that proposed by counsel supporting the complaint, particularly since nothing in that order prevents respondents from available themselves, in a proper situation, of the benefits to which they may be entitled under the Commission's policy statement of December 3, 1953.

Now, in view of the foregoing and upon the entire record herein, the following are my

Findings of Fact

1. Mary Carter Paint Co., erroneously named in the complaint as Mary Carter Paint Company, Inc., is a corporation organized, existing and doing business under and by

virtue of the laws of the State of Delaware, with its principal place of business located at Gunn Highway at Henderson Road, Tampa, Florida. It also maintains offices in New York, its address there being 666 Fifth Avenue, New [fol. 49] York, New York. A predecessor corporation was Mary Carter Paint Factories.

2. Robert Van Worp, Jr. was formerly its president and during that time, and during all the times that they were in effect, cooperated in formulating, directing and controlling the acts and practices found herein. At present he is serving as a consultant to its Board of Directors. He maintains a financial interest in the corporation. His business address is that of the corporate respondent. His home address is Oldsmar, Florida.

3. Mary Carter Paint Co. is engaged in the business of manufacturing, selling and distributing paint and related products to the public, under the label or trade name of "Mary Carter," through various retail outlets and franchised dealers located in various states of the United States.

4. In the course and conduct of their business, respondents cause, and have caused, their paint products to be shipped from their factories in Florida, New Jersey and Texas to Mary Carter paint stores and franchised dealers located in various other states of the United States, where said products are sold at retail. Said respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said paint products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

5. Respondents advertise, and have caused to be advertised, their paints in various newspapers and periodicals of general circulation, and by commercial announcements [fol. 50] over the radio and television across state lines. Among and typical, but not all-inclusive, of the statements contained in such advertisements are the following:

"Buy only Half the Paint You Need."

"Every Second Can Free of Extra Cost."

"Let us show you how to save One Half on your paint costs."

"Buy 1 and get 1 Free."

"I am satisfied with pennies per gallon. . . . You buy

only half the paint you need! . . . The rest is free of extra cost."

"These Mary Carter Paint Factories will be making free paint half the coming year."

"Anytime you can get enough paint to do the extra job, yet pay for only half as much as you need, you're really practicing economy."

"On all paint every Second can Free, gallon or quart no limit . . ."

"Buy a gallon—get a gallon Buy a quart—get a quart."

"How is the Free gallon possible?"

"I can manufacture high quality paint at low cost because of operational economies and because I'm satisfied [fol. 51] with a modest profit! Middlemen eliminated by direct factory-to-store shipments . . . modern paint factories and equipment . . . streamlined merchandising methods. My own fleet of diesel trucks to cut raw materials and shipping costs . . . All of these effect savings which I pass on to you with every 2nd can of paint free of extra cost."

"Why Not Just Charge Half Price? My paints are quality priced because they are quality paints, and I refuse to 'second rate' them with low unrealistic price tags. I'll never classify Mary Carter Paints with cheap imitations being offered, nor will I ever downgrade my products with price reductions, discounts or special sales. I manufacture high quality paint and dramatize my operation economies with every 2nd can free of extra cost!"

"Acrylic Rol-Latex \$2.25 Quart \$6.98 Gallon Every 2nd Can Free Of Extra Cost."

"Liquid Glass Outside Oil Paint \$3.00 Quart \$8.98 Gallon Every 2nd Can Free Of Extra Cost."

6. Through the use of said advertisements, and others similar thereto not specifically set out herein, and by the manner and form in which their contents were presented, respondents have represented, and do represent, directly or by implication, that the usual and customary retail price of each can of Mary Carter paint is the price designated in the advertisement. In conjunction therewith they represent that if one can of Mary Carter paint is purchased at the advertised price, a second can will be given "free," that is, as a gift of gratuity to the retail purchaser.

[fol. 52] 7. The said advertisements are false, misleading

and deceptive. In truth and in fact, the usual and customary retail price of each can of Mary Carter paint was not, and is not now, the price designated in the advertisement but was, and is now substantially less than such price. The second can of paint was not, and is not now, "free," that is, was not, and is not now, given as a gift or gratuity. The offer is, on the contrary, an offer of two cans of paint for the price advertised as or purporting to be the list price or customary and usual price of one can.

8. In the conduct of their business, at all times mentioned herein, respondents have been, and are now, in substantial competition in commerce with corporations, individuals and firms engaged in the sale of paint and related products of the same general kind and nature as that sold by respondents.

9. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been and is being unfairly diverted to respondents from their competitors and substantial injury has been, and is being, done to competition.

[fol. 53] And, from the foregoing, the following is my
Conclusion

The aforesaid acts and practices of respondents, as herein found, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

Order

It is Ordered that respondents Mary Carter Paint Co., a corporation, and its officers, and Robert Van Worp, Jr., individually, and respondents' agents, representatives and employees, directly or through any corporate or other de-

vice, in connection with the offering for sale, sale and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of paint or any other product, do forthwith cease and desist from representing, directly or by implication:

(a) That any amount is respondents' customary and usual retail price of any merchandise when said amount is in excess of the price at which such merchandise is customarily and usually sold by respondents at retail in the recent and regular course of business;

(b) That any article of merchandise is being given free or as a gift, or without cost or charge, when such is not the fact;

[fol. 54] and

It Is Further Ordered that the complaint herein be, and the same hereby is, dismissed as respects respondents John C. Miller and Irving G. Davis, Jr. (named in the complaint as I. G. Davis), in their individual capacities, but not to the extent that they may be subject to this order as officers or agents of the corporate respondent; and

It Is Further Ordered that to the extent that the complaint alleges that the respondents have represented that their advertised price is a factory price or that such a representation, if made, is false, such allegations in the complaint are dismissed.

Herman Tocker, Hearing Examiner.

October 25, 1961.

Respondents' Petition for Review of the Hearing Examiners Initial Decision;

Answer to Respondents' Petition for Review and Cross Petition;

Order Placing Case on Commission's own Docket for Review as to Certain Respondents;

Memorandum in Support of Respondents' Motion to Strike the "Cross Petition";

Answer to Respondents' Motion to Strike Cross Petition; [fol. 55] Order Ruling on Petitions for Review;

Notice of Oral Argument;

Order Extending Time to File Exceptions to the Initial Decision and a Brief in Support;

Respondents' Statement to Exceptions;

Respondents' Brief;

Answering Brief;

Respondents' Reply Brief;

Omitted from the printed Record pursuant to Stipulation as to Printing Record heretofore copied at page 1.

• • • • •

BEFORE THE FEDERAL TRADE COMMISSION

FINAL ORDER—Issued June 28, 1962

This matter having been heard by the Commission upon exceptions to the initial decision filed by respondents, and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission having ruled on said exceptions, and having determined that the initial decision should be modified to conform with the views expressed in the accompanying opinion:

[fol. 56] It Is Ordered that the hearing examiner's initial decision as modified be, and it hereby is, adopted as the decision of the Commission.

It Is Further Ordered that respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

By the Commission, Commissioner Elman dissenting.

Joseph W. Shea, Secretary.

Issued: June 28, 1962.

Attached are Opinion of the Commission by Commissioner Kern and Dissenting Opinion by Commissioner Elman.

OPINION OF THE COMMISSION—June 28, 1962

By Kern, Commissioner:

The complaint in this matter charges respondents with violating Section 5 of the Federal Trade Commission Act. The hearing examiner in his initial decision dismissed the complaint as to two of the officers of the corporate respondent in their individual capacities and dismissed one of the allegations of the complaint as to all of the respondents. He held, however, that the other allegations of the [fol. 57] complaint had been sustained by the evidence and included in his initial decision an order to cease and desist. Respondents, having been granted a petition for review, have filed exceptions to the initial decision and the matter is now before us for consideration.

The respondent corporation, Mary Carter Paint Co.¹ hereinafter referred to as Mary Carter, and a predecessor corporation, Mary Carter Paint Factories, have been engaged in the manufacture, sale and distribution of paint under the trade name "Mary Carter". This product has been sold to the public through the company's own retail outlets and through franchise dealers. It has been Mary Carter's practice and policy for the past ten years to represent in advertising and otherwise that it will give a "free" can of paint with every single can purchased. The following representations are typical of those used by respondents:

"Buy only Half the Paint You Need."

"Every Second Can Free of Extra Cost."

"Let us show you how to save One Half on your paint costs."

"Buy 1 and get 1 Free."

"I am satisfied with pennies per gallon. . . . You buy only half the paint you need! . . . The rest is free of extra cost."

[fol. 58] "These Mary Carter Paint Factories will be making free paint half the coming year."

¹ Erroneously named in the complaint as Mary Carter Paint Company, Inc.

"Anytime you can get enough paint to do the extra job, yet pay for only half as much as you need, you're really practicing economy."

"How is the Free gallon possible?"

"Acrylic Rol-Latex \$2.25 Quart \$6.98 Gallon Every 2nd Can Free of Extra Cost."

The complaint alleges, in effect, and the hearing examiner found that respondents' advertising was false, misleading and deceptive in that each of the amounts designated by respondents as the price per single can of Mary Carter paint was, in fact, the usual and regular price of two cans of such paint and not one can as represented, and that the second can of paint, described as "free", was not given as a gift or gratuity without cost to the retail purchaser.²

Respondents have taken numerous exceptions to the hearing examiner's findings, conclusions and order as well as to certain rulings excluding evidence offered by respondents relating to the quality of Mary Carter paints and to competitive factors existing in the national retail paint market. Their principal contention, however, is that the hearing examiner erred in concluding that Mary Carter's advertising was not proper under the so-called "free rule" enunciated by the Commission in the Black decision.³ The position taken by the Commission in that case is as follows:

[fol. 59] "The use of the word 'Free', or any other word or words of similar import or meaning, in advertising or in other offers to the public, to designate or describe any article of merchandise sold or distributed in 'commerce' as that term is defined in the Federal Trade Commission

² The complaint also charged that respondents had falsely represented that the advertised price of its paint was the factory price but this allegation was dismissed by the hearing examiner.

³ In the Matter of *Walter J. Black, Inc.*, trading as *The Classics Club and Detective Book Club*, 50 F.T.C. 225 (1953).

Act, is considered by the Commission to be an unfair or deceptive act or practice under the following circumstances:

(1) When all of the conditions, obligations, or other prerequisites to the receipt and retention of the 'free' article of merchandise are not clearly and conspicuously explained or set forth at the outset so as to leave no reasonable probability that the terms of the advertisement or offer might be misunderstood; or

(2) When with respect to the article of merchandise required to be purchased in order to obtain the 'free' article, the offerer either (1) increases the ordinary and usual price; or (2) reduces the quality or (3) reduces the quantity or size of such article of merchandise."

Respondents take issue first of all with the hearing examiner's ruling that the advertising in question did not comply with the first paragraph of the above statement since the terms and conditions of Mary Carter's offer of "Every second can free" were not clearly stated. It appears in this connection that the complaint does not allege that respondents had failed to make a clear and conspicuous disclosure of the conditions of their offer and no question was raised during the hearings as to the clarity of their advertising in this respect. We agree with respondents, therefore, that the hearing examiner erred in making [fol. 60] a finding on this point and relying upon such finding in arriving at his ultimate decision in this matter.

Respondents next take exception to the hearing examiner's holding that Mary Carter's advertising did not comply with the aforementioned statement with respect to the use of the word "free" since the "second can of paint" referred to in the advertising was not a gift or gratuity. We do not thoroughly understand the hearing examiner's reasoning on this point, but it is clear from the initial decision that he did find that the cost of the second can of paint is included in the amount which respondents claim is the price per single can (\$6.98 per gallon—\$2.25 per quart). He specifically found in this connection that "The second can of paint was not, and is not now, 'free', that is, was not, and is not now, given as a gift or gratuity." Respondents do not seriously dispute this finding and apparently concede, as indeed they must, that the second can of paint

is not free of charge to the purchaser. They argue, however, that the Black case squarely rejected the "gift or gratuity" theory as the test of legitimacy of a "free" offer and that their advertising is in compliance with the position taken by the Commission in that case.

Respondents are wrong in both of these contentions. The Black decision does not stand for the proposition that an article of merchandise, the receipt and retention of which is conditioned upon the purchase of another article, may be described as "free" when it is not, in fact, given without charge to the purchaser. And respondents' advertising is not sanctioned by the "rule" evolved in that case.

The Commission, on January 14, 1948, issued the following administrative interpretation with respect to the use of [fol. 61] the word "free" to describe merchandise:

"The use of the word 'free', or words of similar import, in advertising to designate or describe merchandise sold or distributed in interstate commerce, that is not in truth and in fact a gift or gratuity or is not given to the recipient thereof without requiring the purchase of other merchandise or requiring the performance of some service inuring directly or indirectly to the benefit of the advertiser, seller or distributor, is considered by the Commission to be a violation of the Federal Trade Commission Act."

The Black case, decided almost six years later, modified this policy statement or rule.⁴ It did not attempt to radically change the meaning of the word "free". In that case, the question before the Commission was not whether an article of merchandise designated as "free" was given without charge to the recipient, or as a gift or gratuity, but whether an article, free of charge, could be designated as "free" when the receipt and retention of such article was conditioned upon the purchase of another article and full and timely disclosure was made of such condition. As stated in that decision, the question before the Commission was:

"May a business man doing business in interstate commerce be charged with engaging in unfair or deceptive acts

⁴In the Matter of *Standard Distributors, Inc.*, Docket No. 5580 (1955).

or practices in violation of the Federal Trade Commission Act if he uses the word 'free' in his advertising to indicate that he is prepared to give something to a purchaser Free [fol. 62] of Charge upon the purchase of some other article of merchandise?" (Emphasis supplied.)

In determining whether the article described as "free" by respondent in that case was given without charge, the Commission concluded that the article required to be purchased had an established price and that the price at which it was being offered for sale was not in excess of that established, or "ordinary and usual", price. It then adopted the reasoning employed in the brief filed on behalf of the Commission in the Supreme Court in the matter of Federal Trade Commission v. Standard Education Society, 302 U.S. 112 (1937), and quoted several paragraphs from that brief in its opinion. We think that the following paragraph from that brief which appeared in the opinion succinctly states the Commission's position with respect to the use of the word "free" in the factual situation then before it:

"When such an offer of a gift is made, the customer understands from the use of the word 'gift' that an article is to be received Without Any Payment Being Made for It. If he is told that it is to be received 'free of charge' if another article is purchased, The Word 'Free' Causes Him to Understand That He Is Paying Nothing for That Article and Only the Usual Price for the Other. If This Is Not the True Situation, There Is No Free Offer and a Customer is Misled By the Representation that He Is To Be Given Something Free of Charge." (Emphasis supplied.)

[fol. 63] The Black case, therefore, modified the earlier interpretation by permitting the use of the word "free" to describe an article of merchandise which was in fact free of charge but which was given to the recipient only upon the purchase of another article or upon the performance of some service inuring directly or indirectly to the benefit of the person making the offer. It did not hold that the word "free" may be used to describe an article which is not, in fact, free of charge or a gift or gratuity.

A necessary corollary to the "rule" in the Black case is that a person can offer as "free" an article which may be obtained upon the purchase of another article only if

the article required to be purchased has an established market price. This concept is embodied in the Commission's Guides Against Deceptive Prices, adopted October 2, 1958. Guide V, which relates to "two for one sales" states as follows:

"No statement or representation of an offer to sell two articles for the price of one, or phrase of similar import, should be used unless the sales price for the two articles is the advertiser's usual and customary retail price for the single article in the recent, regular course of his business.

"(Note: Where the one responsible for a 'two for the price of one' claim has not previously sold the article and/or articles, the propriety of the advertised price for the two articles is determined by the usual and customary retail price of the single article in the trade area, or areas, where the claim is made.)"

Under this Guide, a newcomer to a market selling a product which had not previously been sold in the trade [fol. 64] area in which he is doing business would have no basis for claiming that two of such products were being sold for the price of one. However, a newcomer to a market, selling a product for which a usual and customary price has been established in the trade area in which he was doing business would be permitted to sell the product on the basis of "two for the price of one" if he complied with the Guide. It should be emphasized in this connection that the words "usual and customary retail price of the single article in the trade area, or areas, where the claim is made" which appear in the note to Guide V refer to the price charged by other retailers for the Specific article offered for sale by the person making the "two for the price of one" claim (see subparagraph (a) of Guide I and subparagraph (a) of Guide III), and not to a similar or comparable article.

In this case, when respondents began to offer Mary Carter paint on the basis of "buy one and get one free", there was no usual and customary price for a gallon or a quart of that particular brand of paint. Respondents contend, however, that usual and customary prices were established for their product because they refused to sell

a single can at less than the list price of \$6.98 a gallon and \$2.25 a quart and because Mary Carter paint was of comparable quality to other brands of paint selling at these prices. With respect to the latter point, the hearing examiner properly refused to consider evidence offered by respondents to show that Mary Carter paint was comparable to any other brand of paint selling at \$6.98 a gallon or \$2.25 a quart. Such evidence would be completely irrelevant to the issue of whether respondents' paint was usually and customarily sold at those prices.

[fol. 65] That respondents refused to sell a single can of Mary Carter paint at less than the list price of \$6.98 a gallon or \$2.25 a quart is only one factor to be considered in determining whether these amounts were the usual and customary prices of such paint. What is more important is that a purchaser paying \$6.98 or \$2.25 was entitled to receive and did receive two gallons or two quarts as the case may be. In other words, respondents sold their products in units of two and the price for each unit was \$6.98 or \$2.25. Although there may even have been a few isolated instances where a purchaser paid the list price and refused to take the second can, it is obvious that respondents have usually and customarily sold two cans of paint for the so-called single can price.⁵ Certainly, under the circumstances, respondents could not, for example, change their advertising to read "usually and regularly \$6.98 per gallon—now two gallons for \$6.98." We are in full agreement, therefore, with the hearing examiner's finding that the amount designated in respondents' advertising as the price for a can of Mary Carter paint is not the usual and regular price per single can but the usual and regular price for two cans.

Respondents also take issue with the hearing examiner's

⁵ In a somewhat analogous situation, we have held that the price at which a combination of books and other merchandise was ordinarily sold was the usual and regular price of that combination and not the sum of the prices at which single items in that combination had been offered for sale and had, in fact, been sold on a few occasions. In the Matter of *Encyclopedia Britannica, Inc.*, Docket No. 7137 (1961).

conclusion that even if respondents' practice of offering Mary Carter paint on the basis of "Buy one and get one free" had been permissible when the offer was first made, "by lapse of time the practice would have lost its character of providing a free article incidental to a purchase and [fol. 66] would have merged into a 'two for \$X' pricing arrangement, not a 'two for the price of one' arrangement." While the hearing examiner erred in assuming, as he apparently did, that the list price of respondents' paint was the usual and regular price of a single can when respondents' offer was first made, his conclusion that a "free" offer may become invalid "by lapse of time" does not conflict with the Commission's decision in *Black and Book-of-the-Month Club*.⁶ Respondents contend, in this connection, that these decisions are authority against making the time over which a "free" offer may continue decisive or even a consideration in determining its legitimacy.

The facts of this case are clearly distinguishable from those of the two cases upon which respondents rely. In this case, the item required to be purchased in order to obtain another article has always been sold with the so-called "free" article. Consequently, even if the item required to be purchased, i.e., a single can of Mary Carter paint, had had a usual and regular price when the offer was first made, the price would eventually become the usual and regular price of two cans of paint. In *Black and Book-of-the-Month Club*, however, while the policy of offering "free" books was a continuing one, the merchandise required to be purchased in order to obtain a "free" article was not always the same merchandise. In other words, the respondents in those cases made a series of offers involving entirely different books at varying prices, not a continuing offer of a combination of the same two articles, as respondents in this case have done. Moreover, the cases [fol. 67] are distinguishable in other respects. In *Book-of-the-Month Club*, the respondents advertised that a member of the Club would pay "no more than the publisher's set price for each Book-of-the-Month, the price you would pay in any retail store; indeed, frequently you pay less." This

⁶ In the Matter of *Book-of-the-Month Club, Inc., et al.*, 50 F.T.C. 778 (1954).

representation was never challenged and apparently was accepted as true by the Commission. Furthermore, it appears that in Black, books required to be purchased at stated prices in order to obtain a "free" article were usually and regularly sold by that respondent at those prices without the "free" article since the "free" offer was limited to new members. Consequently, it appears that the Commission had no occasion to decide in either case whether the usual and regular price of a book required to be purchased in order to obtain a "free" book might at some future date become the usual and regular price of both books.

Summarizing our conclusions on this phase of respondents' appeal, it is our opinion that the policy statement with respect to the use of the word "free" announced in the Black decision is not applicable to respondents' advertising since a usual and regular price had never been established for a single can of Mary Carter paint. Each of the amounts designated by the respondents in their advertising as the price per single can of Mary Carter paint has, in fact, been the usual and regular price of two cans of such paint, and not one, as represented. The cost of the second can of paint was included in the price paid by the purchaser, and this second can, therefore, was not given as a gift or gratuity or free of charge to the purchaser.

Respondents have also taken exception to the hearing examiner's refusal to consider certain evidence. [fol. 68] As stated above, evidence offered by respondents for the purpose of showing that Mary Carter paints are comparable to national brand paints was properly excluded by the hearing examiner as irrelevant to any of the issues in this proceeding. Evidence offered by respondents to show why they had adopted the merchandising practices was also properly excluded by the hearing examiner. Whatever respondents' motive may have been, it cannot justify practices found to be misleading and deceptive, and the hearing examiner did not err in refusing to consider this evidence. *Federal Trade Commission v. Algoma Lumber Co.*, 291 U.S. 67 (1934).

Respondents' final exception to the initial decision relates to the order to cease and desist contained therein.

Their contention on this point is also without merit. They have not submitted any proposed modification of the order nor made any suggestion as to how the order should be changed, but merely attack it as being "inapposite and unjustified." Apparently they believe that it should be framed in the language of the policy statement announced in the Black case. Such an order would not be appropriate, however, since, as we have held, the article offered by respondents as "free" was not given free of charge to the purchaser of another article for which a usual and regular price has been established. The order as drafted would prohibit respondents from misrepresenting the usual and regular price of the products they sell and from using the word "free" or similar words to describe an article of merchandise which is not given as a gift or free of charge to the recipient. The order adequately covers the practices engaged in by respondents and cannot easily be misunderstood.

[fol. 69] To the extent indicated herein, respondents' exceptions are denied. The initial decision is modified to conform with the views expressed in this opinion and, as so modified, will be adopted as the decision of the Commission.

Commissioner Elman dissented to the decision herein.

June 28, 1962.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Docket No. 8290

Commissioners: Paul Rand Dixon, Chairman, Sigurd Anderson, William C. Kern, Philip Elman, Everette MacIntyre

In the Matter of: MARY CARTER PAINT COMPANY, INC., A CORPORATION, AND JOHN C. MILLER AND I. G. DAVIS, INDIVIDUALLY AND AS OFFICERS OF SAID CORPORATION, AND ROBERT VAN WORP, JR., INDIVIDUALLY.

COMMISSIONER ELMAN, DISSENTING:

In 1953, in a landmark decision, *Walter J. Black, Inc.*, 50 F.T.C. 225, 232, the Commission stated that the "businessmen of the United States are entitled to a clear and unequivocal answer" to the question whether, and how, [fol. 70] the word "free" may honestly and truthfully be used in offering "something to a purchaser free of charge upon the purchase of some other article of merchandise." The Black opinion was not a narrow disposition of a particular case on its own special facts. Instead, the Commission, acting "in the public interest, and for the advice, guidance and information of businessmen" (p. 235), laid down comprehensive and specific guidelines on use of the word "free" in advertising goods for sale. On December 3, 1953, shortly after the Black case was decided, the Commission took the further step of issuing a policy statement which incorporated almost in haec verba the rules formulated in the Black opinion.

Today's decision neither overrules nor reaffirms the rules established in Black. Instead, the case is "explained" and "distinguished." As a result, uncertainty and confusion are being introduced, needlessly and unsettlingly, into an area of business activity where businessmen and the bar have long regarded the Commission's position as definite and clear. It would seem to me far better, if the Black case is to be overruled, that it be done forthrightly and without equivocation. Such a disposition of the case, whatever else might be said about it, would have the merit of

candor; and businessmen and lawyers would at least know where the Commission now stands in the matter.

I

Prior to the Black decision the problem of how to treat "free" offers of goods had been a perplexing and vexatious one, both to business and the Commission. It is, and has long been, commonplace in the United States for merchandise to be advertised and sold at a stated [fol. 71] price, with another article, or installation or service, or an incidental part or accessory, included "free"—that is, in the sense of being without extra cost to the purchaser. But where receipt of the "free" item is tied to the purchase of another article, it is of course not "free" in other senses of the word:

(1) It is not "free" in that it is not being given away, absolutely and unconditionally, with no strings attached.

(2) It is not "free" in that, unlike an ordinary common-law "gift or gratuity", the donor is not motivated by a "detached and disinterested generosity" (*Commissioner v. Lobue*, 351 U.S. 243, 246), or by "affection, respect, admiration, charity or like impulses" (*Robertson v. United States*, 343 U.S. 711, 714). Commercial transactions are usually entered into for mutual profit, and the *Quid Pro Quo* received by the seller for making a "free" gift to the buyer is the latter's purchase of the article offered for sale.

(3) It is not "free" in that the seller ordinarily recoups the cost of the "gift" out of the price he obtains for the article sold. Sellers are not usually, and cannot afford to be, philanthropists. Unless he wants to go bankrupt, or is able to sustain unending losses on a single product line, a seller must recover the cost of the "free" article in profits from sales.

II

Thus, the use of the word "free" to describe an article given on the purchase of some other article raises [fol. 72] problems of importance to an agency, like the Commission, charged with protecting consumers against deception. The Commission's opinion in the Black case recognized and squarely addressed itself to these problems,

which were constantly recurring and which the Commission had not theretofore definitively resolved. In order to appreciate the great significance of the Black case as the leading precedent in this field, it is necessary to describe the background against which that case was decided.

On January 14, 1948, the Commission had issued a policy statement with respect to the use of the word "free" in advertising. That statement read as follows:

"The use of the word 'free' or words of similar import, in advertising to designate or describe merchandise sold or distributed in interstate commerce, that is not in truth and in fact a gift or gratuity or is not given to the recipient thereof without requiring the purchase of other merchandise or requiring the performance of some service inuring directly or indirectly to the benefit of the advertiser, seller or distributor, is considered by the Commission to be a violation of the Federal Trade Commission Act." (48 F.T.C., at 1315.)

Thereafter, on June 30, 1948, the Commission issued a complaint against Book-of-the-Month Club, Inc. In that case new members were offered one "free" book on enrollment and one "free" book for every two books bought from the club. On June 8, 1952, the Commission entered its decision and order. (48 F.T.C. 1297.) The [fol. 73] majority opinion, written by Commissioner Mead, adhered to the policy statement of January 14, 1948. It held that the "meaning of the word 'free' remains more or less fixed"; that it had "the definite and absolute meaning of a gift or a gratuity given without charge, cost or condition"; and that, accordingly, where there were "a few 'provided, however' or other conditional strings to the so-called 'free' offer", it was deceptive and misleading, even though the conditions on receipt of the "free" article were clearly disclosed. (pp. 1309-12.)

The order issued by the Commission on May 8, 1952, in Book-of-the-Month Club, Inc., was substantially in the language of the 1948 policy statement. That is, it prohibited use of the word "free" to describe merchandise "which is not in truth and in fact a gift or gratuity or is not given to the recipient thereof without requiring the purchase of other merchandise or requiring the performance of some

service inuring, directly or indirectly, to the benefit of the respondent." (48 F.T.C., at 1307.)

On the same day (June 30, 1948) that the Commission issued its complaint against Book-of-the-Month Club, Inc., it also issued a similar complaint against Walter J. Black, Inc., trading as the Classics Club and Detective Book Club, which also offered "free" books to members who bought a specified number of books. The Black case was not decided, however, until September 11, 1953, sixteen months after the Book-of-the-Month Club decision. (50 F.T.C. 225.) In the meantime, significant changes in the membership of the Commission had occurred.

The arguments in the Black case on June 29, 1953, included [fol. 74] ing submissions by *Amici Curiae*, covered a broad range of questions concerning the correctness and scope of the holding in the Book-of-the-Month Club case. And it was for the manifest purpose of setting these questions to rest, once and for all, that the Commission's opinion in Black was written as it was. Not only did the Commission in Black not follow the 1948 policy statement and its prior opinion in Book-of-the-Month Club, it did not even refer to them. Instead, the Black opinion treated the subject of "free" goods advertising as *Res Nova*, to be considered wholly without regard to any actions or statements made by the Commission in the past. The opinion was plainly intended to clear away the residue of uncertainty and doubt left by the Commission's various previous rulings, and to formulate an authoritative, complete, and self-contained exposition of the Commission's position on the subject. Accordingly, the Commission went to unusual lengths in Black to make its opinion not only specific and precise but comprehensive and definitive.

The opinion in the Black case recognized the semantic and other problems raised by use of the word "free" in advertising goods for sale. It noted that such advertising "is by no means new. It has been used by businessmen in the United States for almost 100 years." (p. 232) The facts, it said, "very pointedly present to the Commission the following question for its determination:

"May a businessman doing business in Interstate Commerce be charged with engaging in unfair or deceptive acts or practices in violation of the Federal Trade Commis-

sion Act if he uses the word 'free' in his advertising to in-[fol. 75] dicate that he is prepared to give something to a purchaser free of charge upon the purchase of some other article of merchandise?" (50 F.T.C. 232; capitalized as in the original.)

The Commission declared, "The businessmen of the United States are entitled to a clear and unequivocal answer to this question. * * * [I]n the public interest, and for the advice, guidance, and information of businessmen, we want, through this opinion, to make the position of the Commission as clear as possible." (pp. 232, 235.) The Commission concluded its opinion as follows:

"For the advice and guidance of the respondent herein, and also for the advice and guidance of the thousands of other advertisers who today are using the word 'free' in advertising, we should like to make our position clear. Until such time as either the Congress of the United States amends Section 5 of the Federal Trade Commission Act, or until an appellate Court of the United States clearly interprets the existing provisions of Section 5 of the Federal Trade Commission Act to mean otherwise, our position in this matter is as follows:

"The use of the word 'Free,' or any other word or words of similar import or meaning, in advertising or in other offers to the public, to designate or describe any article of merchandise sold or distributed in 'commerce,' as that term is defined in the Federal Trade Commission Act, is considered by the Commission to be an unfair or deceptive act or practice under the following circumstances:

"(1) When all of the conditions, obligations, or other pre-[fol. 76] requisites to the receipt and retention of the 'free' article of merchandise are not clearly and conspicuously explained or set forth at the outset so as to leave no reasonable probability that the terms of the advertisement or offer might be misunderstood; or

"(2) When, with respect to the article of merchandise required to be purchased in order to obtain the 'free' article, the offerer either (1) increases the ordinary and usual price; or (2) reduces the quality; or (3) reduces the

quantity or size of such article of merchandise." (at pp. 235-36.)

Commissioner Mead, who had written the majority opinion in *Book-of-the-Month Club*, dissented in *Black*. The Commission's action, he correctly observed, constitutes a reversal" of the 1948 policy statement which, as he described it, "held it unreasonable and untrue and therefore illegal per se to describe goods as free which are not free." (pp. 236, 240). In Commissioner Mead's view, goods cannot truthfully be advertised as "free" where any strings or conditions, such as buying another article, are attached. In his opinion, such goods are not free and therefore cannot truthfully be advertised as "free" no matter how clearly the conditions of receipt are set forth in the advertising. As he forcefully expressed his position in the first sentence of his dissent, "This is a case about 'free' books which were not free." But Commissioner Mead also frankly recognized that, although he had won a battle in *Book-of-the-Month Club, Inc.*, he lost the war in *Black*. He was under no illusions that the position he advocated, and which temporarily prevailed in the former case, had been finally [fol. 77] and definitively rejected in *Black*.

The last nail in the coffin of the 1948 policy statement was driven by the Commission on March 9, 1954, when it reopened and substantially modified the order in *Book-of-the-Month Club, Inc.* (50 F. T. C. 778.) The Commission held that the order entered May 8, 1952, prohibited use of the word "free" in advertising "under circumstances which would not now be considered unfair or deceptive." (50 F.T.C., at 781.) It noted that "the order was in strict conformity with the Commission's policy in effect at the time the order was issued. * * * As pointed out by the respondents, however, the Commission's position on this subject has now been changed." (p. 780.) Citing and quoting extensively from the *Black* opinion, the Commission thereupon deleted in its entirety the operative language of its previous order and substituted an order paralleling, almost to the word, the language of the *Black* opinion.

As already noted, the Commission on December 3, 1953, publicly announced that, in conformity with its opinion in *Black*, it had "approved a new trade practice rule with

respect to the use of the word 'free' in advertising and other commercial offers as descriptive of any article of merchandise or service." The announcement stated that:

"The new rule will be included in all future trade practice rules for industries in which there is found to be a need for a rule of this character and the administration of existing rules on the subject previously approved by the Commission will be in accord with the provisions of the new rule.

[fol. 78] "Previously approved 'free' rules prohibited the designation of an article of merchandise as 'free' if there were any conditions, even though fully disclosed, which had to be complied with in order to receive such article. However, under the new rule the word 'free' can be used even though receipt of the article or service described is contingent on compliance with certain conditions, provided all such conditions are clearly and conspicuously disclosed."

In accordance with the Commission's action of December 3, 1953, the "free" goods rule—incorporating the requirements laid down in Black—has been included as a matter of regular course in many trade practice rules promulgated by the Commission. Since 1953, it has commonly been referred to as the Commission's "standard" rule on the subject of "free" advertising offers. And, as recently as June 15, 1962, the Commission included this "standard" rule in the Trade Practice Rules promulgated for the Stationers Industry.

III

Before today's decision, therefore, the Commission's position on "free" advertising was crystallized and clear. The comprehensive rules and guidelines laid down by the Commission in 1953 have neither been revised by Congress nor rejected by the Courts. Until today, they have been accepted by businessmen and the bar as an authoritative statement of the governing requirements of law.

Under these rules, the word "free" may be used to describe an article offered to a purchaser without extra cost to him, provided (1) all of the conditions, obligations, [fol. 79] or other prerequisites to the receipt and retention of the "free" article are clearly and conspicuously ex-

plained to the purchaser at the outset, so as to leave no reasonable likelihood of misunderstanding; and (2) the article which must be purchased to obtain the "free" gift is neither increased in price nor reduced in quality, quantity, or size in conjunction with such offer.¹

Where the requirements thus described in *Black* are satisfied, a seller is not barred from using the word "free" either because (1) the "free" gift is tied to the purchase of another article; or (2) the seller is not making a "gift" in the classic sense, i.e., prompted by personal or philanthropic motives; or (3) the cost of the "free" gift is recouped out of profits derived from sales of the tied product.

Today, however, the Commission resurrects the 1948 policy statement—which had been regarded even by its staunchest adherents, like Commissioner Mead, as having been interred by *Black*. It holds, despite *Black*, that the [fol. 80] 1948 statement has always been the authorita-

¹ The *Black* opinion was specific on this point (50 F.T.C. at 235):

"If a businessman desires to use the word 'free' in his advertising, he must use it honestly. He may not use the word as a device for deceiving the public. For example, if he normally sells a toothbrush for 49¢, he may not advertise that he will give away 'free' a package of tooth paste with the purchase of that same toothbrush at 69¢. In such a case, while the advertiser is holding out to the public that he is giving the toothpaste away 'free,' he is actually adding 20¢ to the price of the toothbrush which must be purchased in order to obtain the 'free' toothpaste. Many examples could be cited, both as to the proper and improper uses of the word 'free' in advertising. However, the essence of this opinion is that there must be truth in advertising to support the use of the word 'free.' If an advertiser either lies as to the facts or tells only part of the truth in his advertising, and such lies or omissions have the tendency or capacity to mislead or deceive the public, this Commission, pursuant to the authority delegated to it by Congress, must inhibit such use of the word 'free' in advertising."

tive and fundamental expression of the Commission's position in this area. It holds, further, that the Black case merely "modified" the 1948 statement "by permitting the use of the word 'free' to describe an article of merchandise which was in fact free of charge but which was given to the recipient only upon purchase of another article * * * It did not hold that the word 'free' may be used to describe an article which is not, in fact, free of charge or a gift or gratuity." (Opinion, p. 6.)

And why, in this case, does the Commission find that respondents' "free" second can of paint was "not, in fact, free of charge or a gift or gratuity"? Because (1) "a usual and regular price had never been established for a single can of Mary Carter paint", and (2) the "cost of the second can of paint was included in the price paid by the purchaser, and this second can, therefore, was not given as a gift or gratuity or free of charge to the purchaser." (Opinion, p. 10.)

The first reason, as I shall try to show, is specious and without relevance to the facts of the case. The second reason is, in essence, a rejection and overruling of Black.

IV

Mary Carter Paint Co. makes and sells paint. For the past ten years it has followed a basic merchandising policy expressed by the advertising slogans "Buy 1 and get 1 Free" and "Every Second Can Free of Extra Cost." The Commission states (opinion, p. 8) that "respondents [fol. 81] sold their products in units of two and the price for each unit was \$6.98 [per gallon] or \$2.25 [per quart]." This simply is not so.

When Mary Carter advertises one quart for \$2.25 and a second quart free, it means that the buyer must pay \$2.25 for the first quart and then may have a second quart for nothing. It does not mean that the buyer may purchase two quarts of paint for \$2.25 and one quart for half that price. The price of a single quart of paint is \$2.25, regardless of whether the buyer wants one quart, two, or a dozen. The customer may and usually does take the second "free" can; but, whether he does or not, the first can will still cost him \$2.25.

Obviously, the second can is "free" to the customer

only in the sense that he pays nothing extra for it. It is not "free" in the sense that it is being given, absolutely and unconditionally, as a gift or gratuity. And, since it costs as much to manufacture one can of paint as another, Mary Carter recoups the cost of the second "free" can out of the price it obtains for the first can. All this is perfectly obvious to all concerned here, as it also was in Black and Book-of-the-Month Club. And, unless those cases are now overruled, they permit use of the word "free" in such circumstances.

I emphasize the absence here of any possible deception arising from a failure to disclose, clearly and conspicuously in the advertising, all of the conditions, obligations, or other prerequisites to the receipt of the "free" article. Without question, as Black recognized, the word "free" may be dishonestly and misleadingly used. Especially in advertising addressed to children, it may be used to give a false impression that something is being given absolutely [fol. 82] "for free", with no strings of any sort attached, and with nothing to buy or do in order to obtain the "gift." Such advertising, as Black makes clear, is fraudulent if in fact the "free" article is not being given away absolutely, unconditionally, and without any Quid Pro Quo.

But that is not this case. As the Commission agrees (opinion, p. 4), there is neither allegation nor proof here that "respondents had failed to make a clear and conspicuous disclosure of the conditions of their offer." In other words, Mary Carter's advertising straightforwardly conveyed the "message" to customers that they had to "buy 1" to "get 1 free". The Commission does not suggest that anyone, no matter how naive, could have been misled into believing that he did not have to buy the first can in order to get the second can free. The whole aim of Mary Carter's sales and merchandising policy was to communicate, as simply and directly as possible, that one had to buy the first can to get a second can free.

The Commission nowhere finds that the Black rules have been violated by respondents' advertising. As to the first—that the terms of the offer must be clearly disclosed—the Commission specifically reverses the hearing examiner's finding that Mary Carter's offer lacked the requisite clarity. And a holding of violation of the second requirement—that

the advertiser not increase the usual price or reduce the quality or reduce the quantity or size of the merchandise—is negatived by the finding (opinion, p. 2) that Mary Carter has followed the same “Buy 1 and get 1 Free” policy for the past ten years.

But, the Commission points out, the cost of the second can of paint must be recovered by respondents out of their [fol. 83] sales; it is necessarily included in the price of the first can; the purchaser “pays” for the second can when he buys the first one; and, therefore, the second can is not free of charge to the purchaser. The short answer is, of course, that this is always true whenever a gift of a “free” article is conditioned upon purchase of another article. The customer always pays, in that sense, for the “free” article. This was just as true in Black and Book-of-the-Month Club, Inc., as it is here. If this is the determinative consideration, then Commissioner Mead was right and we should ban use of the word “free” in every situation where the purchaser has to buy something in order to obtain the “free” gift. But this use of the word “free” was explicitly upheld in the Black case:

“‘if the regular price of the article sold without the premium is the same as the price with the premium, the premium does not cost the customer anything. It is Free To Him regardless of whether or not it is ultimately included in the purchase price, and he does not care whether the manufacturer or dealer makes sufficient profit on the sale to cover the cost of the premium, whether the cost is termed an advertising expense, or whether it causes the manufacturer or dealer to operate at a loss.’” (50 F.T.C., at 234, quoting from the Commission’s brief in *Federal Trade Commission v. Standard Education Society*, 302 U.S. 112; “Free To Him” capitalized in the original.)

Such usage of the word “free” corresponds precisely to its meaning in Mary Carter’s advertising. The Commission [fol. 84] does not dispute Mary Carter’s contention that it refuses to sell a single can of paint at less than the stated price of \$6.98 per gallon or \$2.25 per quart. Thus, to paraphrase Black, the “regular price” of Mary Carter paint “sold without the premium is the same as the price with the premium.” The second can of paint “does

not cost the customer anything;" regardless of how it is paid for, it "is Free To Him."

In this respect, the case is also on all fours with Book-of-the-Month Club. There the Club's offer amounted to "Buy 2 books and get 1 Free"; the member paid no more than he otherwise would for the two books (under the rule of the Black case their price cannot be artificially inflated); and so the third book was "Free to Him". The Commission's attempt to distinguish Book-of-the-Month Club here (opinion, p. 9) is baffling. Both involve a continuing offer over an indefinite period of time that can be acted upon again and again by the same purchasers. The fact—deemed crucial by the Commission—that Mary Carter's paint remains the same while the Club's book titles change is obviously a distinction without a difference. The Book-of-the-Month Club offer of "Buy 2 books and get 1 Free" was without reference to the names or contents of the books. The practice upheld in Book-of-the-Month Club is indistinguishable from Mary Carter's practice, which the Commission now prohibits. What, it is fair to ask, is left of Black and Book-of-the-Month Club?

[fol. 85]

V

The Commission attempts to buttress its position here by reference to the Guides Against Deceptive Pricing. It cites Guide V, which states that "No statement or representation of an offer to sell two articles for the price of one, or phrase of similar import, should be used unless the sales price for the two articles is the advertiser's usual and customary retail price for the single article in the recent, regular course of his business." The "Note" to Guide V explains that "Where the one responsible for a 'two for the price of one' claim has not previously sold the article and/or articles, the property of the advertised price for the two articles is determined by the usual and customary retail price of the single article in the trade area, or areas, where the claim is made."

From these propositions, the Commission reasons, first, that "a newcomer to a market selling a product which had not previously been sold in the trade area in which he is doing business would have no basis for claiming that two of such products were being sold for the price of one", and,

second, that "the hearing examiner properly refused to consider evidence offered by respondents to show that Mary Carter paint was comparable to any other brand of paint selling at \$6.98 a gallon or \$2.25 a quart", because "[s]uch evidence would be completely irrelevant to the issue whether respondents' paint was usually and customarily sold at those prices". (Opinion, p. 7.)

At the root of what is wrong with this line of argument is a misconception of the relevance of Guide V to the subject matter of this proceeding. A reading of Guide V and its explanatory Note shows that they were drafted to deal [fol. 86] with the entirely different problem arising when an item is normally sold at a stated price, and a seller offers "two-for-the-price-of-one" by fraudulently inflating the normal selling price.

This problem of the phony two-for-the-price-of-one offer, expressly dealt with in Black (see footnote 1, *Supra*), is not presented by this case. Mary Carter does not claim to be offering two cans of paint for the "recent" price of one, but two cans for the regular and current price of one. Mary Carter has always offered one can at the stated price and a second free of charge if the customer wants it. Guide V is sound, but it has no application to the sales promotion scheme that Mary Carter has followed for the past ten years.

The second rule laid down in Black provides in part, that the word "free" may not be used "When, with respect to the article of merchandise required to be purchased in order to obtain the 'free' article, the offerer * * * increases the ordinary and usual price". If Mary Carter had regularly sold its paint at \$1.13 per quart, and then raised the price to \$2.25 per quart with a second quart offered "free", that would have been a deceptive and dishonest use of the word "free". See, *E.G., Puro Company*, 50 F.T.C. 454, decided November 19, 1953, two months after Black. In that case, advertisements reading "Buy One—Get One Free * * * Two 25c Packages—25c" were held to be false and deceptive, because the record disclosed that the product "was regularly sold in retail grocery stores at two packages for 25c; there was no evidence that a single package was ever sold for 25c; and certain retail stores sold it at 13c". In the instant case, the record does Not disclose that

[fol. 87] a single quart of Mary Carter paint was ever sold for \$1.13; and, in view of Mary Carter's established and long-continued merchandising policy, it clearly would not sell a single quart at that price. To the extent, therefore, that it is meaningful to speak of a "usual and regular" price for a single quart of Mary Carter paint, it must be \$2.25.²

The same error infects the determination to exclude evidence offered by Mary Carter to prove that its paint is comparable to any other brand selling at \$6.98 per gallon or \$2.25 per quart. If Mary Carter were representing that it now offers two gallons of paint for \$6.98 whereas it once offered only one gallon at that price, Guide V would apply, and only a comparison with the prior price of the specific product—not with prices of comparable products—would be relevant. But this is not Mary Carter's representation; rather, it is that Mary Carter paint has a genuine value, by comparison with other paints, equal to the current prices

² If the Commission were correct in interpreting Guide V to apply to this type of case, then Guide V would also have to be interpreted as overruling and superseding the *Book-of-the-Month Club* case. There the Commission permitted use of the word "free" to describe the offer of a third book as a bonus upon purchase of two books at their current prices. No comparison with the prior prices of those books in the "recent" course of business was made or intended, although the Commission's reading of Guide V would require such a comparison and no other. Since the Commission does not hold that Guide V has overruled *Book-of-the-Month Club*, it cannot consistently find that Guide V controls the result here.

Guide V may support the conclusion that a newcomer to an area may not market a product not previously sold there on the basis that he is now selling two for the price at which he previously sold one; there is no "previously" to cite for comparison. But Guide V is not authority to prevent a newcomer from setting a definite price for his product and then offering to sell each item at that price or to give the buyer a second "free" item for that price. Here there is a basis for comparison; it is the established price of the single item.

charged for each can. Given the requisite facts, the Com-[fol. 88] mission might find that Mary Carter had deceived purchasers by manufacturing a type of paint generally sold at \$3.49, doubling the price to \$6.98, and then making a two-for-the-price-of-one offer. The lack of such facts here, however, rules out any basis for a finding of deception on that score.

VI

This brings me to what is perhaps the most serious deficiency in the majority opinion. The duty of the Commission in this case was to determine whether Mary Carter had violated Section 5 of the Federal Trade Commission Act by engaging in any "unfair or deceptive acts or practices". Yet nowhere does the Commission explain what was "unfair or deceptive" about what Mary Carter did. The word "deceptive" appears in the Commission's opinion on page 2 in a description of the allegations of the complaint and again on page 10 in the observation that a good motive cannot justify a deceptive practice. But we are never informed as to who is, or might be, misled by Mary Carter's "Buy 1 and get 1 Free" offer, or as to how that deception might be brought about. On the contrary, the Commission specifically agrees with respondents that the examiner erred in finding that they "had failed to make a clear and conspicuous disclosure of the conditions of their offer" (Opinion, p. 4). Who, then, was deceived? And how was he injured? A finding of deception is crucial to the issuance of an order. Without it, the order is patently invalid and the Commission's strained effort to "distinguish" Black is much ado about nothing.

[fol. 89]

VII

The Commission's order prohibits respondents from representing:

"(a) That any amount is respondents' customary and usual retail price of any merchandise when said amount is in excess of the price at which such merchandise is customarily and usually sold by respondents at retail in the recent and regular course of business;

"(b) That any article of merchandise is being given free

or as a gift, or without cost or charge, when such is not the fact . . ." (Initial Decision, p. 20.)

A reading of the order invites this question: What must respondents stop doing that they are now doing? Paragraph "(a)" declares that they may not call any amount their usual and customary price if it is in excess of their usual and customary price in the recent, regular course of business. Obviously, this has as little to do with the case as Guide V of the Guides Against Deceptive Pricing. Respondents have never sought to represent their "recent" prices; they advertise only their current prices. As it happens, however, their current prices are the same as their recent prices. Whether regarded as a one-can or two-can price, respondents' advertised price of \$2.25 per quart, for example, is their "usual and customary retail price" Now, and it is not in excess of \$2.25 per quart, which is "the price at which such merchandise is customarily and usually sold by respondents at retail in the recent and regular course of business". Does this mean that paragraph "(a)" has no effect at all on respondents' advertising [fol. 90] practice? Surely not, or the Commission would not issue it. But what effect does it really have, and how are respondents to comply with it? I confess I do not know.

Paragraph "(b)" is almost as puzzling. Presumably, it is intended to require respondents to cease advertising "Buy 1 and get 1 Free". But this cannot be deduced from anything to be found in the terms of the order. As the Commission's own troubles with the problem show, the definition of "free" merchandise is no easy matter. Yet respondents are ordered, on pain of heavy penalties, to cease and desist from describing merchandise as free "when such is not the fact". Surely this provision, like paragraph "(a)", is indefensibly vague, particularly in light of the Supreme Court's recent call for Commission orders "sufficiently clear and precise to avoid raising serious questions as to their meaning and application". *Federal Trade Commission v. Henry Broch & Co.*, 368 U.S. 360, 368 (1962).

VIII

The Commission's action today cannot help but have unfortunate effects reaching far beyond the four corners of the present proceeding. It is bound to become a leading "authority" in the field and therefore a necessary source of reference for businessmen planning to conduct "free" goods advertising campaigns. Yet, how anything but uncertainty and confusion can follow today's decision, I do not know. Respondents here engaged in a form of advertising which Commission rulings expressly and repeatedly sanctioned, and on which they had every right to rely. Yet now they are held to have violated the law and [fol. 91] are being subjected to a broad and indefinite cease-and-desist order with severe penalties for any violations.

To discover the Commission's current views of the requirements of law in this field, businessmen and their lawyers will no longer be able to rely upon the comprehensive and comprehensible rules laid down in *Black*. Instead, they will have to read (1) the 1948 policy statement which was overruled in *Black*, (2) the *Black* majority opinion, which is "distinguished" but not overruled today, (3) the *Black* dissenting opinion, which while not expressly adopted by the Commission today seems at least to be back in good favor, and (4) the majority opinion in the instant case. After examining these materials, how will a lawyer answer a client who asks: "May I advertise something as 'free' to purchasers who buy another article at a stated price, if the advertisement clearly discloses all the terms and conditions of the offer?" The only safe answer would seem to be: "I don't know. I've read all the Commission opinions on the subject, and I still don't know. What's more, I don't think the Commission knows. You better not take any chances."³

June 28, 1962.

³ How, for example, would a lawyer be able to advise his client as to the legality of so entertaining and honest a use of the word "free" as appears in the advertisement appended hereto?

[fol. 92] BEFORE THE FEDERAL TRADE COMMISSION

Docket No. 890

In the Matter of: MARY CARTER PAINT COMPANY, INC., A CORPORATION; AND JOHN C. MILLER AND I. G. DAVIS, INDIVIDUALLY AND AS OFFICERS OF SAID CORPORATION; AND ROBERT VAN WORP, JR., INDIVIDUALLY.

Room 2704-I,
United States Court House,
Foley Square,
New York, New York.

Transcript of proceedings—May 3, 1961

Met, pursuant to notice, at 10:15 a.m.

Before: Herman Tocker, Hearing Examiner.

APPEARANCES:

Garland S. Ferguson; Attorney for the Federal Trade Commission.

Messrs. Sullivan & Cromwell, 48 Wall Street, New York, New York; By: David W. Peck and Richard Sexton, Esqs., of counsel and, Joseph P. Tumulty, Jr., Esq., 1317 F Street N.W., Washington, D. C.; Attorneys for the Respondents.

Proceedings

* * * * *

1. The corporate respondent, its correct name being Mary Carter Paint Co., admits insofar as they are directed, to wit: All the factual allegations contained in the complaint [fol. 93] but denies all inferences, interpretations, conclusions and charges therein set forth. Such admission is conditioned, however, on the admitted fact that the illustrative quotations set forth in Paragraph 4 of the complaint do not in all or in some instances set forth fully and completely the material in connection with which or of which the quotations were a part, and Respondents reserve for the hearing the right to demand (to which counsel supporting the complaint agrees) the introduction in evidence

of complete items and not mere quotations or excisions. (So that there may be no misunderstanding of what is said in this paragraph, respondents do not relinquish nor dilute in any manner the effect of their denials of Paragraphs 5, 6, 8, and 9.)

5. The corporate respondent admits that the advertisements and commercial announcements to which reference is made in Paragraph 4 of the complaint (qualified as to content or entirety as above provide) are a fair depiction of the advertising and commercial announcements which it and its former subsidiary, Mary Carter Paint Factories have utilized for at least approximately the past seven years.

IRVING GEORGE DAVIS, JR., was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Hearing Examiner Tocker: What is your full name and address?

[fol. 94] The Witness: Irving George Davis, Jr., 212 South Church Street, Tampa, Florida.

Direct Examination.

By Mr. Ferguson:

Q. Mr. Davis, are you the Davis that is named in the complaint by the Commission, Docket No. 8290?

A. Yes, sir.

Q. Would you state, please, your occupation?

A. I am president of Mary Carter Paint Corporation.

Q. How long have you been president?

A. Since December 22nd, 1960.

Q. What was your occupation before that?

A. I was in the consultant business for a period of time.

Q. Describe that, please.

A. I was also employed by Rhem.

Q. Did this have something to do with management organization, this management consultant?

A. Yes, it would.

Q. Mr. Davis, there have been introduced into evidence today a number of advertisements of the Mary Carter Corporation which were supplied by the corporate respondent in this matter. I would ask you whether the same particular format is being carried on today in regard to the statement which appears on most every one of these ads; that is, "Every second can free of extra cost."

[fol. 95] A. Yes, sir. That is still a basic format of our advertising and continues to be.

Q. As to the corporate structure, sir, tell us briefly what that structure is.

A. Reporting to me as president are Mr. Vedda, vice president of operations; Mr. Crosby, vice president; Mr. Barnes, director of advertising; Mr. Roper, sales manager; Mr. Lehner, franchise director; and Mr. Rice, comptroller.

Q. In connection with the parent corporation, are there not a number of subsidiary corporations?

A. The subsidiary corporations that were in existence last year have recently been merged into one corporation.

Q. Before the merger, sir, what was their position in regard to the parent company? Were they wholly owned?

A. Yes.

Q. To your knowledge and your study of the merchandising policy of Mary Carter, you stated the format is the same. I now ask you, to your knowledge, whether it has been the same over a number of years.

A. To my knowledge, that particular line to which you refer has been used for a number of years; perhaps not exactly as stated, but the general meaning has been in effect for a number of years.

Q. The general meaning, sir, I ask you if you refer to "Every second can of paint"——

A. I believe that's the statement you referred to.

Q. Could you tell us how many paint factories exist under the present corporate structure of Mary Carter?

A. Do you mean how many facilities manufacturing paints?

Q. That is correct.

[fol. 96] A. There presently are in existence three factories, three plants: Mattawan, New Jersey; Tampa, Florida, and Conroe, Texas; and a fourth facility is in the process of being ready, but it is not actually turning out paint today, at Chino, California.

.

Q. Mr. Davis, you have testified as to the advertising format of the "Every second can free," and I would ask you with reference to your present administration what would be the standard policy if a customer entered a Mary Carter store and attempted to purchase a single gallon of paint insisting that that was all the paint he wanted and he could not use a second can.

A. Our policy, as it is clearly stated in our advertising to the consumer, says that we will sell a gallon of paint under only one condition, and that is for \$6.98. If the customer wishes a gallon can of paint, they can receive it in only one manner, and that is by paying \$6.98, which entitles them to receive a second gallon can of paint free.

Q. I will ask you this, sir: What would happen if a customer came in and asked for two quarts of paint of the same variety and same color, the \$6.98 variety?

A. If they wished to purchase two quarts?

Q. Yes.

A. We would sell him two quarts.

Q. How much would he get?

A. He would get two quarts of paint.

Q. For what price?

A. If it's the same variety, he could get that for \$2.25 for each quart, which would entitle him to receive two [fol. 97] additional quarts of that variety or a cheaper variety free of extra cost.

Q. How much paint would he walk out of the store with?

A. Four quart cans of paint.

Q. How much is that?

A. Four quarts of paint.

Q. Is that a gallon of paint?

A. That's four quart cans of paint.

Q. Do four quarts equal a gallon?

A. That is correct, sir.

Q. Under the present corporate structure, as I understand your testimony, sir, all of the subsidiaries have been merged into the parent corporation; is that correct?

A. Yes.

Q. Before that merger what proportion of the advertising costs of advertising in newspapers and television, and so forth, did the parent corporation assume? Did they assume any of the advertising costs of any of the subsidiaries?

A. For stores that were wholly owned by the company, the parent company supported the entire thing.

Q. How about franchised stores?

A. The franchised stores, the company supported fifty percent of the cost of the basic forms of advertising.

Q. Was there a central clearance on all advertising?

A. All advertising?

Q. All Mary Carter advertising.

A. The corporation makes up mats for its dealers and television films and so forth.

Q. What position, if any, does Walter Bryden hold in your corporation?

[fol. 98] A. He's the supervisor.

Q. Did he attend openings of various stores, and things of that nature?

A. He could.

Q. Would he at that time be authorized to make statements for the corporation?

A. He's an employee of the corporation, but he's not an officer.

Q. In attending an opening of a store and commenting on policy, would his statements have any effect? What effect, if any, would they have on the corporation?

Mr. Sexton: Are you asking him for a legal conclusion?

Mr. Ferguson: I am asking him how much authority this particular gentleman exercises in regard to the franchise stores. He said he was in a supervisory capacity.

The Witness: That's a term that we use that is explanatory for servicing operations which we carry for the fran-

chised dealers. He is not an officer of the corporation. He would have no authority to state policy of the corporation.

Q. How many paint products does Mary Carter manufacture today?

A. The number of its items is quite substantial. I would imagine it is around two hundred; but again——

Q. This is paint?

[fol. 99] A. If you included all the different sizes——

Q. Name for us, briefly, the principal ones.

A. I would like to add, for the correct answer to that statement I would again refer to records from Tampa, if you wish that information.

The principal items we make are paint products of various types, such as interior and exterior paints.

Q. What name would that sell under besides Mary Carter?

A. All of the paint is Mary Carter paint. There are various——

Q. I call your attention to the name Rol-Latex.

A. That's one of our trade brand names.

Q. What type of paint would that be?

A. That's an interior latex paint.

Q. I call your attention to the name "Liquid Glass." What type of paint would that be?

A. That's an exterior house paint. It's an enamel trim paint used for exterior or interior.

Q. I think you have testified that Mary Carter has other products besides paint; is that correct?

A. We do sell other products besides paint. We do not manufacture them.

Q. Does your merchandising policy, "Every second can free," apply to your other products?

A. Products that we do not manufacture are not merchandised in that manner.

Q. Mr. Davis, as president of the corporation, what would your position be in regard to the statement that is made by a subordinate official or a supervisor to the effect: "The free gallon is not actually free, but is a method of showing our clients that Mary Carter can pass on production cost savings of a quality product to the consumer"?

[fol. 100] Mr. Sexton: I think I would object to the form of the question, Your Honor. He has posed a hypothetical or unreal question.

Hearing Examiner Tocker: There is no foundation laid for that question and I will sustain the objection. There is no evidence here that any employee did make such a statement.

Mr. Ferguson: Please, Your Honor, I would ask at this time that Your Honor take official notice of a publication, the Connellsville Courier, Connellsville, Pennsylvania, April 19th, 1961, in which, in an article featured in that paper, such a remark is attributed to a representative of Mary Carter.

I would ask that Your Honor take notice of that and that the witness be allowed to answer the question.

Mr. Sexton: I object, Your Honor. It is triple hearsay. I don't think that would meet your request for a proper foundation.

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Hearing Examiner Tocker: I will sustain the objection as to form, but I would permit a question as to whether the witness concurs in a statement attributed to Bryden to the effect that "The free gallon is not actually free, but a method of showing our clients we can pass on production cost savings of a quality product to the consumer."

If counsel objects to that, he may note his objection.

[fol. 101] Mr. Peck: We don't object. If I understand what this question comes down to, it is asking this witness to comment upon what his conception of the essence and meaning of the "free gallon" is. That's one way of expressing it, I suppose.

Hearing Examiner Tocker: The question I am asking—and Mr. Ferguson doesn't have to adopt it if he doesn't want to; and you have a right to object to it and I will rule on it—is this: Does this witness agree with the statement as quoted.

Mr. Ferguson: I do ask him that, Your Honor. I think that's a restatement of my previous question when I asked him what his position would be.

I will ask him now again:

By Mr. Ferguson:

Q. Mr. Davis, do you concur with the statement appearing in the newspaper article which has been discussed on the record? Do you concur with that statement as to the second gallon not being actually free?

A. No, I do not.

Q. Mr. Davis, I am going to ask you to go back into the history of the corporation, and I ask you to tell me, if you can, who was the president of Mary Carter when you were executive vice president?

A. During that period Mr. John Miller was president.

Q. Is that John C. Miller who is named in the complaint? [fol. 102] A. Yes.

Q. At that time what were Mr. Miller's duties?

A. As charged in the by-laws of the corporation, the duties of the president are spelled out in the by-laws.

Q. Are they similar as those duties which you described unto yourself?

A. Yes.

Q. Mr. Davis, I will ask you this in connection with your position: Has it ever been brought to your notice that gallons of paint had been sold in Mary Carter paint stores in the gallon container with the sale being two quarts at \$2.25 a quart and two quarts free?

A. Would you clarify that question?

Q. Have you ever noticed that such sales were made?

A. Repeat the question.

Q. Whether it has been brought to your notice and attention in your official capacity that sales have been made at Mary Carter paint stores of a gallon of paint in the gallon container whereby the sales transaction was two quarts at \$2.25 a quart and two quarts free.

A. No. It has never been brought to my attention that such a practice was carried on during my tenure as president. If it were brought to my attention, and this practice would be a direct violation of our price policy and our franchise agreements, we would act accordingly as we are given the right to under our franchise agreement to handle such a violation.

Mr. Ferguson: I believe that's all on direct.

[fol. 103] Hearing Examiner Tocker: Do you want to examine?

Mr. Sexton: No questions.

Hearing Examiner Tocker: The witness is excused.

(Witness excused.)

Mr. Ferguson: I call Robert Van Worp.

ROBERT VAN WORP, JR., was thereupon called as a witness on behalf of the Commission and, having been first duly sworn, testified as follows:

- Direct examination.

By Mr. Ferguson:

Q. What is your full name?

A. Robert Van Worp, Jr.

Q. What is your address?

A. Oldsmar, Florida.

Q. Are you the Robert Van Worp named in the Commission's complaint?

A. Yes, I am.

Q. What is your occupation, sir?

A. At present?

Q. Yes.

A. I am a consultant to the board of Mary Carter.

Q. Are you still connected with Mary Carter Paint Company?

A. Yes.

[fol. 104] Q. Mr. Van Worp, how long have you been with the Mary Carter Paint Company? Were you with it in its inception?

A. Yes, I was.

Q. You have been with it, then, to the present time?

A. Yes, sir.

Hearing Examiner Tocker: Fix a date, please.

The Witness: My father began this business, and I was with him in one capacity or another throughout the existence of the business.

Hearing Examiner Tocker: What year was that?

Mr. Sexton: I think I might clear it up a little bit. The question was about the present company. That's only two years old. The predecessor company, as I understand it, was Mary Carter Paint Factories.

Hearing Examiner Tocker: What date did that start?

The Witness: That was started in 1950.

Hearing Examiner Tocker: You have been with this enterprise from the beginning until now?

[fol. 105] The Witness: Excepting for a short period of time in the service.

By Mr. Ferguson:

Q. During that time, Mr. Van Worp, did you hold any official position or positions with the company?

A. As an officer?

Q. Yes.

A. Yes, I did.

Q. Tell us briefly what positions they were.

A. I was vice president of the corporation at one time. I was president of the corporation at another time.

Q. Fix those dates for us.

A. Not exactly, I can't. I was president from October of 1959 until December of 1960. I can't fix the term I was vice president.

Q. How long have you been in the paint business?

A. In one way or another, I have been in it since I was a child, I guess you would say.

Q. Approximately twenty years?

A. Yes, sir.

Q. In connection with Mary Carter, what would you say your duties and responsibilities were?

A. My duties and responsibilities were quite varied. It took in each and every phase of the business.

Q. Did that include development of products and production, sales administration?

A. Yes, it did.

Q. What would you say were the three leading products of Mary Carter in your time? Would they be Latex and Liquid Glass and Rol—

A. You mean sales-wise?

Q. Yes.

[fol. 106] A. Latex paint is the biggest selling item. Outside house paint and interior enamel would come next.

Q. Would you say that these were the paints that appear in the advertisements mostly?

A. Yes.

Q. You are still connected with the corporation. Has it ever been brought to your attention that stores have sold a gallon of paint in a gallon container billing the customer for two quarts and the other two quarts free?

A. It has been brought to my attention that that incident has occurred, yes.

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Q. Mr. Van Worp, I show you what is marked for identification as Commission's Exhibit 66 (handing to witness). I ask you if you will take a look at that, please, and see if you can identify that as a communication coming from your corporation and signed by Robert Emerson.

A. This is correspondence from our company.

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Mr. Ferguson: Your Honor, I have a few more questions of this witness. I would like to try to clear, for my own benefit at least, the history of the corporate structure of this corporation.

It is my understanding, from information received from the witness, furnished to the Commission, that the parent corporation, in an operation of a paint business, at one time was Mary Carter Paint Factories, Inc.

[fol. 107] By Mr. Ferguson:

Q. Is that right?

A. I can give you the chronological sequence.

Q. That would be helpful for the record.

A. Originally, my dad started in the paint business in 1940. In 1950 he formed a corporation known as the Plastic Finishers Company. This corporation, the name of it, was changed to Mary Carter Paint Factories in 1956. In 1958 my father and members of our family sold controlling interest in this company to another corporation who has since merged with Mary Carter Paint Factories and has

become the successor corporation. This is known as Mary Carter Paint Company. That is up to the present time.

Hearing Examiner Tocker: Was there ever any Mary Carter?

The Witness: I guess there was, many——

Hearing Examiner Tocker: In this paint company?

The Witness: No, there was not.

Hearing Examiner Tocker: The reason I ask you is because one of the exhibits in evidence tells about Mary complaining about her board of directors trying to persuade her to change the pricing practices and she does not want to, and she has this battle everytime the board of directors meets.

Do you remember that one?

[fol. 108] The Witness: Yes.

Hearing Examiner Tocker: What do they mean by that ad?

The Witness: We run quite a few ads in the first person, as Mary Carter would be speaking if she were a person, and that is one of that series.

By Mr. Ferguson:

Q. I think you testified that you and your father sold the majority interest. Do you still maintain an interest in the corporation?

A. Yes, we do.

Mr. Ferguson: Your Honor, I believe that is all on direct examination.

Mr. Peck: May I see that exhibit, that Emerson letter, Mr. Ferguson?

Mr. Ferguson: Here it is.

Cross examination.

By Mr. Peck:

Q. On June 5th, 1959, the date of this letter, Exhibit 66, what was Mr. Emerson's position with the Mary Carter Paint Company, Mr. Van Worp?

A. He was an administrative assistant in the office.

[fol. 109] Q. Was he an officer of the company?

A. Not at that time he was not.

Q. Would you tell us, please, what the policy and practice of the Mary Carter Paint Company has been in any instances in which it has been brought to its attention of any store or dealer selling a gallon of paint at less than whatever the gallon price is?

A. Well, our policy, of course, is never to do that.

Q. Never to do what?

A. Never to sell a single can of paint at less than its advertised price.

Our policy in connection with dealers whom we would hear had made a practice of this would be to warn them and reprimand them and tell them that if we could prove it, or if we heard it again and could prove it, we would discontinue selling paint to them.

Q. Have you had many reports of dealers or stores violating your rule on this subject?

A. No, sir, not more than a few.

Q. What have you done in those instances?

A. In some cases it has become necessary to cancel our franchise with these people. In some cases it has been cleared up and the practice stopped.

Q. Would you say that it has been made perfectly clear to your dealers and the stores that it is against public policy and a violation would be met with disciplinary action for any store to sell a single gallon can of Mary Carter paint for less than the gallon price?

A. I would say that that is our most explicit rule-of-thumb policy that we have.

Q. But would you say it was clearly understood?

A. Yes, sir, I would.

[fol. 110] Mr. Peck: I have no further questions.

Hearing Examiner Tocker: Mr. Ferguson?

Re-direct examination.

By Mr. Ferguson:

Q. Under your administration, sir, when you were an officer and the company was under your direction, as to your knowledge of present and past practices in connection with the corporation, has it been the corporation's

policy to, on a quart basis, sell two quarts and give two quarts free?

A. Yes, it has.

Q. And four quarts is what?

A. Four quarts is four quarts.

Q. Is that a gallon?

A. There are four quarts in a gallon, yes.

Q. Is it possible that in this selling of two quarts and giving two quarts free that this was done, has been done, is done, in the gallon container as well as in the quart cans?

A. This is not done as company policy, no. Whether it has been done or not, I don't know.

Mr. Ferguson: I believe that is all, Your Honor.

Hearing Examiner Tocker: Basically, this respondent and its predecessors were manufacturers?

[fol. 111] The Witness: Yes, sir.

Hearing Examiner Tocker: And they also sold through their own stores at retail?

The Witness: Yes, sir.

Hearing Examiner Tocker: Besides that, they sold through franchised dealers who were not connected with the company?

The Witness: That's right.

Hearing Examiner Tocker: The franchised dealers would be independent, subject only to whatever contract they might have had with the company?

The Witness: Yes.

Hearing Examiner Tocker: Was it the practice in granting franchises to use a uniform franchise agreement?

The Witness: They were all uniform with the exception of possible territorial options.

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[fol. 112] Mr. Ferguson: I would like to ask one more question, Your Honor.

Hearing Examiner Tocker: Go right ahead.

By Mr. Ferguson:

Q. Where the customer insists that he wants an uneven number of gallons, one gallon, three gallons, five gallons, would he be sold that uneven number of gallons?

A. If he buys one gallon, he gets one free. If he buys three gallons, he gets three free, and so on, or cans, or whatever they are.

Q. If he bought one gallon he would get one free; is that correct?

A. Yes.

Q. But suppose he wants to buy just one gallon without one free?

A. He's still entitled to take the free can if he so elects.

Q. How about in a five-gallon instance?

A. He, again, is entitled to take an equal number of cans free.

Q. Would he be charged for that extra gallon \$6.98, or whatever the advertised price was?

A. He would be charged at the multiple times the price, whatever he buys. If he buys three, it would be three times the price of the paint.

Q. Isn't it a company policy, to your knowledge, that a sale is based on the customer taking the second gallon?

A. He does not have to take it, no, sir.

Q. If he comes in and wants to buy one gallon of paint, would you sell him one gallon for \$6.98, or would you sell [fol. 113] him two quarts and give him two quarts free?

A. We always sell a person a gallon of paint at the advertised price when he asks for a gallon of paint.

Q. You would not sell him two quarts and give him two quarts free?

A. If he asked for two quarts, we would give him two quarts.

Q. Two quarts would be approximately \$4.50?

A. Yes, it would be, of a paint that sold at \$6.98 for a gallon.

Hearing Examiner Tocker: Isn't it obvious, gentlemen, and shouldn't it be conceded, that whether the can of paint the customer gets is—using the terminology of this case—"free" or whether it's the can for which he pays, either way it costs the company the same?

Mr. Peck: Precisely. It is spread over, but each can costs the company the same to make as any other can, of course.

Hearing Examiner Tocker: Do you have any problem with that, Mr. Ferguson? I thought you might have something else in mind in your question.

Mr. Ferguson: I think that counsel for the respondent has stipulated by his statement that there is a production cost to the respondent for the second can of paint.

[fol. 114] Hearing Examiner Tocker: He would not want to do anything else but stipulate to that.

Any other questions?

DOUGLAS D. TABER, was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Hearing Examiner Tocker: Will you please state your full name and address?

The Witness: Douglas D. Taber, 451 Medford Road, Birmingham 15, Alabama.

Direct examination.

By Mr. Ferguson:

Q. Mr. Taber, you gave your address as Birmingham, Alabama?

A. That's right.

Q. How long have you been in Birmingham?

A. I have lived there slightly over three years.

Q. What is your occupation, sir?

A. I am manager of a paint store.

Q. Calling your attention to the dates in and around June of 1960, at that time what was your occupation?

A. I was a salesman at that time, a paint salesman.

Q. Whom did you work for, sir?

A. Kirby-Pierce Paint Company.

[fol. 115] Q. And where were you located at that time?

A. The business address?

Q. Yes. Where was that?

A. At 912 Second Avenue North, Birmingham.

Q. Will you tell us briefly what your duties were in connection with your occupation at that time?

A. I worked as a floor salesman and an outside salesman, both.

Q. In connection with your occupation at that time, Mr. Taber, could you tell us what if anything you did in the shopping of competitors?

A. Well, I was appointed—I guess I could say—by Mr. Pierce, the president of the company, to find out our competitors' prices in order to keep ourselves competitive and keep in line with the other paint companies in town, if that's what you mean.

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Q. What visits, if any, Mr. Taber, did you make to a Mary Carter Paint Store or stores to purchase paint?

A. Well, I made a visit to a Mary Carter Paint Store in the middle of, I would say, the first part of June, 1960.

Q. Could you tell us what occurred at that time, Mr. Taber?

A. I attempted to buy a gallon of their latex paint. I believe they call it Rol-Latex, or something similar to that. It is the one they advertise for \$6.98, I believe it is, and a gallon free. I went into the store on Bessemer Highway. In the presence of a real estate person I asked if I could buy one gallon of paint. They said that I could. I told them that I didn't need but one gallon—

[fol. 116] Mr. Peck: Could you say who you were talking to?

By Mr. Ferguson:

Q. Could you identify who you were talking to at that time? Was this gentleman a salesman, or could you tell who he was?

A. I don't know his name. He was a salesman who worked in the store.

Q. Did you make a purchase at that time?

A. No, sir, I didn't make the purchase.

Q. Will you continue to tell us what transpired at that time?

A. Well, he got a gallon from a stack of paint they had

in front. He brought it out and rung up a cash register ticket. I asked him if I could have a ticket showing the amount of the purchase and the quantity of the purchase and the amount of the dollars and cents. He wrote the ticket as being two quarts at \$2.25—I'm sorry; I am mistaken. It was four quarts.

The first ticket was four quarts, two quarts at \$2.25 and two quarts free. I told him that the ticket would have to show a gallon. He says he could not write it up showing a gallon. I said that I couldn't get my money returned if I didn't show a gallon and I refused to take it under those circumstances.

Q. Who if anyone accompanied you on that sale?

A. No one accompanied me.

Q. Did there come another time when you made another visit to a Mary Carter Paint Store?

A. Yes, sir.

Q. Tell us when that was, please.

A. That was about two weeks later, still in June.

Q. Who if anyone accompanied you at that time?

[fol. 117] A. A representative of the Federal Trade Commission.

Q. Could you give us his name, please?

A. I believe his name was Causey.

Q. How did it happen that Mr. Causey was with you?

A. I wrote to the Federal Trade Commission to ask about if there was any way that we could receive protection from such type merchandising in our community. He responded by coming to Birmingham.

Q. Will you tell us what transpired on this particular visit? What store was this that you visited?

A. It was the same store on Bessemer Highway, the same clerk. Mr. Causey went in with me. I made all of the conversation. I made the purchase. It was very similar except for the fact that they were much more—they seemed to be much more cautious this time and it took them somewhat longer to make out the ticket. The ticket wasn't exactly as it was written before. This time it read two quarts of latex paint, \$2.25, plus the tax.

I also at that time asked him if it would show one gallon. He said no, it wasn't possible for them to do that. I believe he said that they would have to—if they wrote it showing

a gallon, they would have to—I believe he said they would have to write it up showing a gallon and then give a gallon with the purchase, if they wrote the ticket up showing a gallon. I purchased it for \$4.50 plus tax and we left.

Q. What were you given for the \$4.50, if anything?

A. I don't understand you.

Q. Were you given something by the clerk? Did you walk out with something?

A. Yes. I was given a cash register ticket showing the amount of the purchase. Then I was given a sales slip [fol. 118] showing the two quarts and the amount of the purchase and the gallon of paint.

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Q. Mr. Taber, I show you what has been marked for identification as Commission's Exhibit No. 69. I ask you if you can identify that can of paint which you purchased on the second visit to the store which you have described in your testimony.

A. That's it, yes.

Q. I show you, Mr. Taber, appearing on the can of paint, a crayon mark approximately in the center of the can, and the word "free" above there, and below the line the words "Bought, \$2.25 per quart, \$2.25 per quart, \$4.50."

I ask you if you can tell us how that got on there.

A. The sales personnel in the Mary Carter Store wrote that on there.

Q. Wrote that on there in your presence?

A. Yes, sir.

.

Q. Yes. After you had been to this Mary Carter store and had this experience there, I am just asking you what prompted you to call the Better Business Bureau.

A. Well, I had seen advertisements of Mary Carter selling their latex at \$6.98 a gallon and a gallon free. Like I said, I shopped the store and found out that they didn't necessarily have to sell a gallon to give a gallon away free. They didn't necessarily sell for \$6.98 a gallon.

[fol. 119] I felt like this was false advertising, so I called the Better Business Bureau to ask them if there was some-

thing that could be done as far as protection as far as our business was concerned, that they were competitors of ours.

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Q. It is suggested that I ask you whether the gentleman at Mary Carter, when you first went there, said why he couldn't give you a slip regarding a gallon of paint for \$4.50.

A. If I recall correctly, he made a statement of something like that his company had informed them not to do such. I think his full statement was that the Federal Trade Commission wouldn't let them, the authorities, or whoever it concerned wouldn't let them do that.

Q. At least he gave you to understand that to do anything of that kind would be contrary to company policy and instructions; is that right?

A. Yes, sir.

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ROBERT VAN WORP, JR., was recalled as witness for the respondents and, having been previously duly sworn, testified further as follows:

Direct examination.

By Mr. Peck:

Q. Mr. Van Worp, how long have you been associated with the Mary Carter Paint Company?

[fol. 120] A. I have been associated with Mary Carter since its inception.

Q. When was that?

A. 1951.

Q. What have been your positions with that company, and you might roughly give us the dates when you held those positions.

A. Well, roughly, I served in various production and administrative capacities from 1951 until about 1955. I became vice president of the company about that time.

I served as executive vice president until 1959, and then I was president of the company.

Q. And you were president until when?

A. December 1, 1960.

Q. And you presently have what connection with the company?

A. I am a consultant to the board.

Q. I take it, then, that for the past ten years, the entire life of this company, you have been intimately familiar with its production of paint and its advertising and pricing policies?

A. Yes, sir, I have.

Q. I hand you a prospectus which is the prospectus as it was in final form, rather than the preliminary prospectus which was put in evidence by Mr. Ferguson—

Hearing Examiner Tocker: Is it the same?

Mr. Peck: It may be slightly different, but this is the prospectus as it went out. I am going to offer it in evidence, but I just wanted to ask a question first of the witness.

[fol. 121] Q. I ask you whether this prospectus is a fair description of the business of the Mary Carter Paint Company.

A. Yes, sir, it is.

Mr. Peck: I offer it in evidence.

Mr. Ferguson: I might state at this time that I have not seen this document, other than the one that is in evidence. I have no reason to believe that it is not what counsel says it is, but I would like a chance to examine it before acquiescing that it go into the record. I haven't even looked at it.

Hearing Examiner Tocker: Well, did you offer the other prospectus?

Mr. Ferguson: Yes, sir, I did. If you remember the pre-trial hearing, that was among the documents that were agreed on going into the record. I have not seen this document. I would like a chance to examine it.

Hearing Examiner Tocker: I see no reason to delay the hearing. We will take a couple of minutes recess since counsel has stated it is substantially the same. Suppose we look it over and compare it with the other one.

(Recess taken.)

Hearing Examiner Tocker: On the record.
[fol. 122] Mr. Ferguson: Having examined the document during a brief recess, Your Honor, I have no objection to it.

Hearing Examiner Tocker: It is received in evidence as Respondents' Exhibit No. 2.

(The document referred to was marked Respondents' Exhibit 2 and received in evidence.)

By Mr. Peck:

Q. Could you give us a brief description of this company during its first year of operations?

A. During its first year or years?

Q. The first year, at the beginning?

A. We started in a very small way in Tampa, Florida, and we commenced to do business on the basis of giving a free can of paint with each one sold.

Q. How many factories did you have?

A. We had one plant at that time.

Q. How many employees did you have?

A. I would estimate that we had between ten and fifteen.

Q. How many stores did you have by the end of the first year, roughly?

A. Two.

Q. Where were they located?

A. Tampa, Florida and St. Petersburg, Florida.

Q. How many factories do you have today?

A. We have three plants, with another about to open, which will make four.

Q. Where are those plants located?

A. Tampa, Florida; Matteawan, New Jersey; Conroe, Texas; and Chino, California.

Q. How many employees do you have today?

[fol. 123] A. I would say between 400 and 500.

Q. How many stores?

A. Over 600.

Q. Would you comment upon your manufacturing process, as to its modernity?

A. Well, at the time we started in business, the manufacturing processes that were used were stepped up con-

siderably ahead of competition at the time. As a result of the industry—

Q. I don't want any long answer. Just tell me this, if I may put it to you: Is your plant and your manufacturing process, so far as you know, as modern and as efficient as anything in the paint business?

A. Yes.

Q. Would you tell us what you regard as some of the distinguishing features of the conduct of your business other than the second can free? I am going into that in a little more detail, but aside from that, hit the highlights of what you consider your distinguishing features.

A. The chief point, I would say, would be the elimination of middlemen in our merchandising system. We have short-cut methods of distribution, such as using our own trucks and locating our plants centrally to our markets. We provide no cushion in the pricing of our products for discounts to favored customers. Our dealers work on a larger margin of profit than the industry norm. We try to have as integrated a company set-up as we can in all departments, such as advertising, production, shipping and sales.

Q. Do you have any warehousing?

A. No, sir, no, intermediate warehousing.

Q. In other words, if I understand you, all of your paint goes from your factories to the stores direct, is that right? [fol. 124]

A. Yes, it does.

Q. All of it goes by your own trucks, is that right?

A. Yes, sir.

Q. Do you have any charge accounts?

A. Not at the retail level, no.

Q. Do you give any discounts to anybody who buys paints?

A. No, sir.

Q. How does your line of products, as to the number, compare with the number of products of the leading paint makers, national paint makers?

A. The only paints that we make are household products, and we carry the shortest possible line that we can.

Q. How many products make up your line?

A. I would say there are 150 to 200 items consisting of different sized packages and colors, as well as different lines of paints.

Q. The large national brands would have how many?

A. It is hard to say. It would be a thousand or more.

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Q. I am coming, Mr. Van Worp, to the company's advertising policies. What is the keystone of your advertising policy?

A. Our free can distributorship setup. Is that what you mean?

Q. That's right. How long have you been advertising and operating on the basis of a second can free?

A. Since the inception of the Mary Carter Paint business.

Q. Can you tell us, from your own knowledge, as to how far back you have been submitting to the Federal Trade [fol. 125] Commission advertising which shows that your basic advertising policy is a second can free?

Mr. Ferguson: I object to that, Your Honor. I think that is irrelevant.

Mr. Peck: I am not claiming any estopple here.

Hearing Examiner Tocker: I recall that Mr. Sexton in his opening said he would not plead an estopple. I suppose since portal to portal, nobody would think of doing it. I think that I will allow the questioning on this basis. I want a complete record here.

A. I would say since approximately 1955.

Q. I want to ask you now, Mr. Van Worp, whether—I will withdraw that.

Have you attempted to ascertain, as best you can from various sources of information, at the present time what percentage of your business is a repeat business; that is, customers who have bought Mary Carter paint before and are repeating on it?

A. As an estimate which is based on my experience over the years, I would say from 50 to 90 percent.

Q. Will you comment as to what your aim is and your implemented aim in respect to getting repeat business?

A. Of course, our aim is to get all of our customers back. We try, through our merchandising program and our educational program of our employees, to service and handle the people in the proper way and give them the best possible products we can.

Q. Can you comment upon the amount of complaints you get about your products?

[fol. 126] A. Our complaints are very minor, very few.

Q. Has that been so for ten years?

A. Yes, sir.

Q. I hand you a document here which is entitled "Top Ten Brands in Miami, Florida," and I ask you if that is something you are familiar with.

A. Yes, I am.

Hearing Examiner Tocker: If you are going to have a number of documents, why not turn them on the table now so that we won't get interrupted during the hearing? Let Mr. Ferguson look at them. I am assuming that he may not have seen them. If he has seen them, that is another thing. But if he hasn't seen them, I think it would be desirable that we have these papers laid on the table.

Mr. Peck: I am perfectly willing to do that, Your Honor. I am not sure of the ones that I am going to offer, but the ones that I am sure I am going to offer, I will put them right on the table. I think this is the extent of what I am going to offer (indicating papers).

Q. Will you tell us what this is, please?

A. That is a survey conducted at the behest of the Miami Herald, pertaining to various products sold in the local Miami area.

Q. The Miami Herald is what?

A. A city newspaper in Miami.

Q. And it purports to be the result of their survey, the top ten brands, in terms of sales in the Miami area for various products?

A. Yes, sir.

[fol. 127] Mr. Peck: I offer this in evidence, Your Honor, with particular reference to paint.

Mr. Ferguson: If it please Your Honor, I fail to see the relevancy of this document. I don't think, in the first place, that it is relevant. In the second place, I don't think a proper foundation has been laid for the introduction of that particular document. I object to it both on the grounds of relevancy and of identification.

Mr. Peck: If you want to get the man from the Miami Herald here, I can do that on the square of competency.

As far as materiality is concerned, this gives the figure for paint products for the three years, 1958, 1957 and 1959. The purpose of it is to show the growth of the Mary Carter business and I think the inescapable inference to be drawn therefrom, namely, that you can't build a business and have the business grow like this except by giving people a high-quality product which satisfies the customers.

Mr. Ferguson: If it please Your Honor, the quality of this product is not under attack in this complaint. I think if this is offered to show quality, it certainly is not material to the issues.

Hearing Examiner Tocker: On growth, you have growth figures in the annual report, I believe. What I am trying to find is this: every time a survey is offered, it is not unique to have them offered here. The question is, who [fol. 128] made the survey, the manner in which it was made, the reliability of the survey. Let me see what they say about it here.

Mr. Peck: Let me ask the witness a question, if I may, Your Honor.

Q. Can you tell us whether or not this survey is used by business firms in the Miami area—

Mr. Ferguson: I object to that, Your Honor. He is not competent to answer that.

Mr. Peck: Let's find out whether he is or not.

Q. I am asking you, do you know whether or not—and you can answer this yes or no. Do you know whether or not this survey is used by business firms in the Miami area as an informational tool in their business?

A. Yes, it is used.

Mr. Ferguson: I move that the answer to the question be stricken from the record. This man is not competent to testify as to that.

Q. Tell us how you know it.

A. Well, I have been in business in the Miami area for a good many years.

Q. Do you talk to people in the various businesses down there?

A. No, I am not answering from that point. I am answering from my own use of it.

Q. Well, do you know whether other business houses use it?

A. Not specifically, I don't.

[fol. 129] Mr. Ferguson: I think the witness has shown by his own testimony and his own knowledge that he cannot answer the question.

Mr. Peck: He says he has used it, which is sufficient.

Hearing Examiner Tocker: What is the purpose of this offer, Mr. Peck?

Mr. Peck: Basically, Your Honor, to show that this is a company which is building and growing and, as I say, I think the inescapable inference from that is satisfied customers with a quality product.

Hearing Examiner Tocker: Would that be relevant to the issue as to whether a method of advertising which is under attack here is a proper method?

Mr. Peck: I think it is.

Hearing Examiner Tocker: It might prove the contrary, because sometimes an improper method will induce the largest growth.

Mr. Peck: That might be so for a year, Your Honor, but the rock upon which we are standing here is that this advertising policy is a rock. It's nothing fly by night. It's nothing in the quicksand. It's nothing aimed to catch somebody unaware for the moment. This is the rock upon [fol. 130] which this business has been built for ten years, and we are going to get deep into quality here if we are allowed to do it consistent with the answer that we have put in here: that here is a company that has as fine a quality of paint as there is in the market; that it is giving the consumer what is the equivalent of double value, and that its frank advertising policy is an honest statement of that double value, and the kind of a thing that you build a sound business on.

Hearing Examiner Tocker: This survey purports to be only for the year 1959.

Mr. Peck: Well, it has 1958 and 1957, the three years.

Hearing Examiner Tocker: I am going to sustain the objection to this, but it is marked for identification.

(The document referred to was marked Respondents' Exhibit 3 for identification.)

Hearing Examiner Tocker: We have some new rules governing a situation of this sort. The new rule is fashioned after Federal Rule 35, I believe. The reporter is required to report this as an excluded document and it goes to the Commission for review.

Mr. Peck: May I inquire, Your Honor, whether you have sustained the objection upon the ground of competency or on the ground of materiality, because if it is competency, [fol. 131] I will just produce somebody from the Miami Herald or we will go to Miami for a hearing.

Hearing Examiner Tocker: I see no need to do that. They have quite a lengthy explanation of the manner in which the survey has been made. It seems to be a survey conducted upon reasonably acceptable methods. The only problem I have with it is the relevancy to the particular issue we have here now, as to whether the advertising itself is a method of advertising to be condemned.

(The document referred to, previously marked for identification Respondents' Exhibit 3, was rejected.)

By Mr. Peck:

Q. The advertising which has been employed for these past ten years, Mr. Van Worp—will you state whether or not it indicates that the second can free is a continuing policy, business policy, of the Mary Carter Paint Company, or whether there is any indication that it is just temporary?

A. It indicates a continuing policy.

Q. Aside from your advertising, are there other means in which you advise the public that day in and day out, year in and year out, Mary Carter is selling paint on the basis of a second can free?

A. It can be seen on our signs on the outside of our store buildings, and it can be seen—

Q. Just pause there for a moment. Is there a sign on the outside of all of your stores?

A. Yes, sir.

Q. Which says "Mary Carter Paints"?

A. Yes.

[fol. 132] Q. Does it make reference to the second can free?

A. Yes.

Q. Painted right on the sign?

A. In most cases, right on the building.

Q. Is there any other way in which you are advising the public that this is your continuing policy?

A. This fleet of trucks that we have have billboards painted on the sides of them showing that.

Q. How many trucks do you have?

A. I would estimate 30 or 35 all together.

Q. Are they on the road all the time?

A. Pretty nearly all the time.

Q. I hand you what purports to be a photograph of some trucks and I ask you whether that is a fair representation of your fleet of trucks.

A. Yes, sir, it is.

Mr. Peck: I offer the photograph in evidence.

Mr. Ferguson: No objection.

Hearing Examiner Tocker: It is received as Respondents' Exhibit No. 4.

(The document referred to was marked Respondents' Exhibit 4 and received in evidence.)

By Mr. Peck:

Q. How else do you advise the public that you are continuously on the basis of a second can free?

A. Well, from time to time there are window streamers hung in the windows. For those people who come into [fol. 133] our stores, there are placards and streamers inside the stores which state that.

Q. How about your cans of paint?

A. Also, the tops of our cans are lithographed with that message.

Q. I hand you the top of a paint can and I ask you if that is a fair sample of the tops of your cans of paint.

A. Yes, sir, it is.

Mr. Peck: I offer it in evidence.

Mr. Ferguson: No objection, Your Honor.

Hearing Examiner Tocker: It is received as Respondents' Exhibit 5.

(The item referred to was marked Respondents' Exhibit 5 and received in evidence.)

By Mr. Peck:

Q. Will you state, please, Mr. Van Worp, whether or not this company has a firm policy with respect to any store or franchise dealer selling paint on any basis other than the published price for a quart or a gallon with a second quart or a second gallon free?

A. We do have the policy which provides for adherence by both company stores and franchise dealers.

Mr. Peck: What I am going to ask now, Your Honor, is a bit repetitive. I want to be sure that it is complete.

[fol. 134] Q. I will ask you to testify as to what the company does and has done over the years to see that that policy is observed at all Mary Carter stores.

A. Well, we have an educational program for all new people coming with the company, whether they are employees or dealers. We have from time to time reminded these people, through correspondence from our main office, generally from the sales department, that our policy is based on selling a can of paint and giving one free with it. We have a group of men who are called supervisors, who visit our dealers and our company-owned stores on a quite frequent basis and check for adherence to that policy as well as all other company policies.

Q. Have you ever employed shoppers?

A. Yes, sir, we had a shopping firm a number of years ago which shopped most of our Florida stores.

Q. For what purpose?

A. Adherence to policy and to check the honesty of clerks and so forth.

Q. Have any store franchises been withdrawn because you have discovered violations of your policies?

A. Yes, sir.

Q. About how many?

A. That is hard to say. It is very few. I would say half a dozen at the most.

Q. Is Mr. Emerson any longer with this company?

A. No, sir.

Q. He hasn't been with the company since when?

A. Since December of 1960.

Hearing Examiner Tocker: And this is the Mr. Emerson who was the signer of a particular exhibit?

[fol. 135] Mr. Peck: That's right.

Hearing Examiner Tocker: Perhaps we ought to identify that exhibit for the record.

Mr. Peck: Commission's Exhibit 66, Mr. Examiner.

Q. Can you tell us whether or not Strickland & Son is any longer a franchised dealer?

A. No, sir, they are not.

Q. And they haven't been since when, do you know?

A. I don't recall. I would say around the end of 1959.

Q. Mr. Van Worp, will you tell us how you have arrived at the price for a can of Mary Carter paint?

A. We always attempt to price our products competitively on the national market.

Q. Will you explain that a little more fully, if you will, please, what your aim is in that respect?

A. Our aim in that respect is to qualify our products as quality products via the price which has become the yardstick for the measurement of quality in the paint field.

Q. What is that yardstick?

A. Price.

Q. Whose prices?

A. Generally, the nationally advertised products.

Q. If I understand you correctly, the price you put on a can of paint is what you have found to be the single-can price of comparable quality of national brand paints, is that correct?

A. Yes, sir, competitive with their prices.

[fol. 136] Q. And what is your aim and claim in respect to the quality of your product in relation to that of the national brands at the same price per can?

Mr. Ferguson: I will object to any line of questioning which goes into the quality of respondents' product. Any evidence or testimony going to the quality of respondents' paint is outside the scope of the complaint. The quality of respondents' paint is not under attack. The advertising of the respondent is the subject of the complaint. I think to burden the record with voluminous testimony about quality of respondents' paint when it is not at issue is burdensome and it is irrelevant to the issues of this case.

Mr. Peck: If Your Honor please, the bulk of our proof is going to be on the subject of quality. You are familiar

with our answer and our position in this case, which is very fundamental. It is going to be a fundamental here, of course, as to what the Commission's case and claim is.

We claim—and we are going to prove, unless Your Honor rules it out—that gallon for gallon this paint is as good, if not better, than any paint of comparable class and price per can; and that what this company does as an actual fact is to give double value, so that in relation to the leading national brand paints, anybody who buys a can of Mary Carter paint is getting double value. That is quite at the heart of this company's business and defense here.

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[fol. 137] I might as well get into this now because it goes to our answer in this case. I am going to offer in evidence this sheet, which is a sample collection of planted items by the publicity agents of the National Paint and Varnish Association, through which they have plastered this country with the idea, most assiduously developed, that price, quality and value are all the same; that you get exactly what you pay for, and that anybody who pays anything less than the fixed price of the national brands is getting gypped.

It is against this background that we are operating here. This makes an impression. You couldn't sell paint at a half price without being the victim of this. We are still the victim of it because they talk about it even here: that anybody who buys paint on a free basis or two for one is getting gypped, although, as I say, they have retreated from that position. But having in mind our affirmative defense in this case, Your Honor, I offer in evidence this publicity as having a bearing upon consumer psychology.

Mr. Ferguson: If it please Your Honor, I am going to object to the introduction of this or any similar evidence or testimony which does not relate to the issue here of whether respondent has violated Section 5 of the Federal Trade Commission Act. This document has not, certainly, been identified. I don't know what it is. Respondent says it is something. He has laid no foundation for it. He put it in his answer, but as far as having any relevancy to this complaint, I think it is far afield and I would strenuously object to it.

[fol. 138] Mr. Peck: Let's get it straight as to competency. You mean you want me to call somebody from the National Paint, Lacquer and Varnish Association to testify that this is something they have gotten out? Do you have any doubt about the genuineness of it whatever?

Mr. Ferguson: If it please counsel, I am not here to advise you on how to try your case. I think that you are utterly competent. Why should I force my opinion on that? I think that this particular flyer, or whatever it is certainly has no bearing on this particular case.

Mr. Peck: Well, materiality is something else again.

Hearing Examiner Tocker: I don't think that counsel would press the point about the qualification of the paper itself, because, if that were the only objection I am sure I could persuade counsel to withdraw the objection. However, the question is, assuming that the respondent in this case is the direct objective of scurrilous advertising and attacks by competitors, would that be a defense to an alleged deceptive form of advertising?

Mr. Peck: Of course not, Your Honor. I would be the first to concede that to be so. The question of whether it is deceptive advertising, I would say, would have little to do with the scurrilousness of the attack.

I am not offering this on the scurrilousness of the attack. I am offering this upon the public psychology, the [fol. 139] public price psychology which is created and obtains as a result of this kind of high-pressured, high-priced public relations by our competitors. We have alluded to it in our answer. I regard it as very material, as a background for our pricing policy, as to why we don't do what your competitors want us to do; to put a \$3.50 price tag on this paint. That is what this case is about. I don't know whether it is the millions or the hundreds of thousands of dollars that they have spent to create this psychology to get people to equate the quality of the paint with the price tag on it. They would be very happy—and that's what they are trying to force us to do—to sell this paint for \$3.50 a can.

I say to Your Honor respectfully that it is of the utmost materiality, in my opinion, as bearing upon the pricing policy of this company, the background for it, the reason for it, the necessity for it, if it is going to be competitive

and if it is not going to be put out of business by these people, whose declared purpose it is to put them out of business—I say that this is highly material as background and the reason for the pricing policy bearing, in my opinion, respectfully, upon the legitimacy of it.

Hearing Examiner Tocker: Well, a commodity can be priced at almost any amount. It is not like saying, “Here is a 25-cent piece, and for every 25-cent piece you buy from me for a quarter, I will give you a dime free or I will give you a quarter free.” That is not susceptible of argument. In a sense, what you have sought to bring out as a defense here is that, “Our can is comparable to \$6.95 or \$6.50 legal tender and we are giving you another \$6.50 legal tender free.”

[fol. 140] Mr. Peck: That’s right.

Hearing Examiner Tocker: Well, without in any way ruling on the question of deceptive advertising, which is the issue in this case, I am going to rule that the fact that you put a certain price label on a can, because you are of the opinion that that can is of a quality comparable to an equivalent price label put on by one or more competitors, is irrelevant to the issues in this case. I think you have made a very, very complete statement in your offer of proof. It is entirely up to you as to whether you want me to report the testimony which you would care to put on the record in order to support the statement. Perhaps counsel is willing to accept that statement. I don’t know. I don’t want to urge him to do it. This is entirely within his judgment.

Mr. Ferguson: If it please Your Honor, I think that is something counsel must decide. I know that frequently in these matters proffers of proof are made. I think that is something counsel has to decide.

Mr. Peck: Has Your Honor ruled upon this?

Hearing Examiner Tocker: I will exclude that. It will be marked Respondent’s Exhibit 6 and will be rejected.

(The document referred to was marked Respondent’s Exhibit 6 for identification and rejected.)

[fol. 141] Mr. Peck: We will go ahead with our evidence, Your Honor.

Hearing Examiner Tocker: Are we going ahead now on

the excluded material which is to be reported as excluded material, or are we going ahead with the basic defense?

Mr. Peck: I would say this is the basic defense.

Hearing Examiner Tocker: Then you go ahead and we will decide as you go along whether this comes within the area of excluded material or possibly new material which will be newly excluded, or possibly admitted.

By Mr. Peck:

Q. Mr. Van Worp, will you tell us from your own experience what this company has done in respect to ascertaining and maintaining the quality of its paint on a basis compared with the same class of product at the same single-can price of leading national paint manufacturers?

Mr. Ferguson: Before he answers, I take it from this point on, unless Your Honor so indicates, this material is to be excluded? Is that correct?

Hearing Examiner Tocker: Well, this is the same general trend.

Mr. Peck: Yes.

[fol. 142] Hearing Examiner Tocker: It is excluded.

A. We have always maintained a practice of testing competitive products for various properties which are desirable in that particular kind of paint in our own laboratories, and we maintain a staff to do that. We also do basic research in our own field; that is, checking all new raw materials for possible use and improvement of our existing products. At times there have been independent tests made of our products by independent laboratories.

Q. What would you say about the ingredients of your paint, as to the quality of the ingredients?

A. The quality of all of our raw materials are the highest and they are attested to by our suppliers.

Q. Let me ask you this: do you buy your ingredients from the leading manufacturers of such ingredients?

A. Yes, most of the leading manufacturers and many recognized smaller manufacturers.

Q. For example, give us the names of some of the suppliers.

A. We buy titanium from duPont; National Lead, American Cyanamid. We buy zinc from New Jersey Zinc Com-

pany, American Zinc Company. We buy resins from Archer-Daniels-Midland Company. We buy oils from Archer-Daniels, also, and Cargill, Inc.

Q. I think perhaps that is sufficient. Just tell us whether or not you know that the ingredients which go into your product are the best available.

A. They are the best that we can obtain, sir.

Q. Are they the best that can be obtained by anybody? [fol. 143] A. Yes, they are.

Q. Would you say what these tests that you have made from time to time establish as to the quality of your paint in any class with that of the leading manufacturers of that class of paint?

A. Our paints have always proven to be of the highest quality in all cases, at least as good and in many cases better than competition.

Q. I ask you this, Mr. Van Worp: has Mary Carter made any offers to any one to join in a scientific and objective test of its products with that of national leading manufacturers?

A. Yes, sir, we have.

Q. That offer has been made to whom?

A. The National Paint, Lacquer and Varnish Association and the National Better Business Bureau.

Q. Was the offer accepted or rejected?

A. It was rejected.

Q. Will you state whether or not the National Paint, Varnish and Lacquer Association has finally stated whether or not it questions the quality of Mary Carter paints?

A. I believe recently they stated that the quality angle is not at issue any more.

Q. And how about the National Better Business Bureau?

A. The same.

Q. Let me ask you whether or not your pricing and selling has been subjected to the most widespread disparaging attacks of your competitors?

A. It has.

Q. And in the face of that, have your sales continuously increased?

A. Yes, sir.

[fol. 144] Q. Can you tell from your experience in the

paint business Mr. Van Worp, what deceptive advertising does for a company's business over a period of years?

A. It would be my opinion that anything that is purported to have properties that it does not contain would in the long run ruin the product as well as the people who put it out.

Q. Do you think it is possible to build a business like Mary Carter has been built over a period of ten years and have deceptive advertising?

A. No, sir, I do not.

Mr. Peck: That is all I have.

Cross-examination.

By Mr. Ferguson:

Q. You testified to some extent in your earlier testimony here today about the build-up of the company, some of the things it did in merchandising methods. You made one statement, as I recall, that you had eliminated the use of the middleman. Mary Carter does sell paints through retail outlets, is that correct?

A. Yes, sir.

Q. It does not sell from the factory. It sends the paint out to the stores, is that correct?

A. Well, we also sell that way, yes.

Q. But is not the majority of your paint sold at retail stores?

A. In company-owned stores?

Q. Yes.

A. No.

Q. Where is it sold?

[fol. 145] A. The majority of it or the bigger portion would be sold through franchise dealers.

Q. Do these franchise dealers have a margin of profit at which they do business?

A. Yes, sir.

Q. And how about the Mary Carter paint stores, the people who run those stores? Do they operate them on a margin of profit?

A. No, they are employees.

Q. But the franchise dealers do operate on a margin of profit, is that correct?

A. That's right.

Q. Can you tell us what that would be with regard to the markup of the paint?

A. You mean the percentage?

Q. Yes.

A. It is 25 percent of the list price of the paint.

Q. Counsel asked you, and I objected and over my objection you testified that as far back as 1955, which was shortly after, two or three years after the inception of your company, that your advertising was inspected by the Federal Trade Commission.

A. I lost track of the question. Would you repeat it, please?

Hearing Examiner Tocker: Read the question.

(Question read.)

A. I did testify to that yes.

Q. Isn't it true, Mr. Van Worp, that—

[fol. 146] Hearing Examiner Tocker: Let us get this straight. He didn't really testify that it was inspected. He testified that since 1955 his company has been submitting its advertising to the FTC.

Mr. Ferguson: I am certainly glad to have that correction made.

Q. You have submitted advertising since that time?

A. Yes.

Q. Isn't it true, Mr. Van Worp, that a good deal of that advertising was submitted under an order of the Federal Trade Commission?

A. It was submitted in compliance with an order.

Q. And that order dealt with false and misleading advertising, did it not?

Mr. Peck: I object to the question.

Hearing Examiner Tocker: Overruled. It was brought out by the witness that the advertising was submitted. He is entitled to show the circumstances under which it was submitted.

Mr. Peck: The order upon which it was submitted has

nothing to do with this case, Your Honor. There is no claim here that there has been any violation of that order.

Hearing Examiner Tocker: I am going to overrule the objection.

The Witness: Will you give me that question again, please?

[fol. 147] (Question read.)

A. I would suppose that it did, yes. In my opinion, it does not.

Q. I believe you testified, Mr. Van Worp, that as a part of your company's policy, you employed shoppers to check and shop your own stores, is that correct?

A. Yes, sir.

Q. And to report violations of your policy which you set out very thoroughly in your direct testimony, is that correct?

A. Yes, sir.

Q. We have in evidence Commission's Exhibit No. 66, which is a letter from Mary Carter Paint Factories to Strickland & Son. I ask you to look at that letter again. As I recall your testimony, you testified that Strickland & Son was no longer a dealer for Mary Carter, is that correct?

A. Yes, sir.

Q. Would you tell us, having looked at this letter and refreshed your memory as to Strickland & Son, if it is not a fact that their franchise was withdrawn from them by Mary Carter because of sales such as described in this letter?

A. That was one circumstance of it, yes.

Mr. Ferguson: I believe that is all I have on cross examination, Your Honor.

Re-direct examination.

By Mr. Peck:

Q. I would like to ask you, Mr. Van Worp, in connection with your advertising policy, with particular reference to [fol. 148] Commission's Exhibit 4, why it is that you price a can of paint at \$6.98 and give a gallon free instead of charging \$3.50 a gallon for the paint.

A. We feel that our products should be priced at competitive levels with products of equal worth. We don't want them to be associated with low-priced paints which have become—I suppose I could say accepted by the general public as low in quality.

Q. Well, let us get on that for a moment. Do you know whether there is a general public psychology or a public opinion as to the quality of a can of paint with relation to the price tag on it?

Mr. Ferguson: I object to that. If counsel wishes to put on public witnesses or something like that, it is a little different than this man testifying as to the psychology of the public.

Hearing Examiner Tocker: Well, if he is familiar with the buying habits of the public—and I think he has brought it out by his background since 1951—I will allow him to testify.

Q. Answer the question, please.

A. I think there is a definite psychology by the general buying public about the relationship between quality and pricing of paints.

Q. Do you know whether or not such a psychology has been very carefully nurtured and built up over a period of years by the National Paint, Lacquer and Varnish Association?

Mr. Ferguson: I will object to that.

Q. What is your answer?

[fol. 149] Hearing Examiner Tocker: Wait a minute. I haven't ruled yet. I will sustain the objection. He has testified that there is such a psychology. The manner in which they arrive at the psychology is irrelevant.

Mr. Peck: Would Your Honor just allow me to ask him this?

Q. As to whether or not Respondent's Exhibit 6, which is rejected, fairly represents widespread placements of publicity over the country over a continuing period of time.

Mr. Ferguson: I object to that, Your Honor, on the ground of materiality.

Hearing Examiner Tocker: This will come within the ambit of excluded testimony to be reported.

Mr. Peck: That's right.

Q. Will you answer the question?

A. Yes, sir, that type of article has been widely circulated.

Hearing Examiner Tocker: Not in the form in which it is shown in the exhibit, but in broken-down pieces?

The Witness: That general display. That in itself has been very widely circulated, that thing there.

[fol. 150] Hearing Examiner Tocker: In other words, in both ways?

The Witness: Yes, sir.

Mr. Peck: That is all.

Mr. Ferguson: If it please Your Honor, again I would have the record show that this witness' remarks as to quality and also as to the excluded documents have been excluded.

Hearing Examiner Tocker: Yes, with the exception of a single question, based upon his experience, as to the psychology or price awareness of the public as an identifying factor in the selection of paint.

Mr. Ferguson: I understand Your Honor overruled my objection.

Hearing Examiner Tocker: On that, yes.

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ALFRED DRISCOLL, was called as a witness for the respondents and, having been first duly sworn, testified as follows:

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[fol. 151] Q. Would you give a brief summary of your educational background, Mr. Driscoll?

A. Well, I have two degrees: Bachelor of Science in Chemistry and a Chemical Engineering Degree from the College of the City of New York. I graduated with honors, magna cum lauda, phi beta kappa. Since the time of my

graduation, I have been working in the paint industry, both as a consultant chemist and as a chemist in charge of various plants.

Hearing Examiner Tocker: What year of City College?
The Witness: 1932 and 1933.

Q. So you have been working approximately 25 years in the paint business?

A. Yes, and I have also got a lot of experience as a paint contractor because I earned my way through school. I would say about 30 years in the paint business.

Q. In your work as a consultant, do you do tests on paints, comparative tests, as a matter of routine?

A. Well, my main function is to formulate paints as required by my customers, which can be done in several different ways, as per sample, or purely on my own opinion as to the situation, or it could be entirely started by me because I feel that being a little ahead of the field as compared to the knowledge of my customer, I should advise him that he ought to have a new product.

Q. How many clients do you have, Mr. Driscoll?

A. About 20 to 25 clients.

Q. Paint companies?

[fol. 152] A. It varies slightly from month to month, occasionally.

Q. These are paint company clients?

A. Mainly paint companies. I also work for the raw material houses that supply them.

Q. Are you a consultant to Mary Carter, that is, are they clients of yours?

A. Only in so far as these tests.

Q. And you have no future arrangements with them?

A. No past or future arrangements.

Q. You are familiar with industry technology and testing methods generally used in the industry, are you?

A. Yes.

Q. Were you contacted by Mr. Vedda of Mary Carter to do some comparative tests for purposes of this case?

A. Yes, towards the end of June, Mr. Vedda gave me a very brief outline of the case and wanted to know whether I would have the time to test the paints, and I agreed.

Q. His suggestion was that you test them blind, is that

correct; that is, that you would not know the names of the paints you were testing?

A. Yes.

Q. Let us get into the testing. Would you describe the first step you did, the purchase of the paints?

A. Well, starting the last week of June, I went out to various suppliers as close to New York as possible, naturally, and I bought paints that fell within the categories that Mr. Vedda wanted me to test. There were five categories: a white enamel of the highest quality that could be used for interior or exterior, a color enamel which is mostly sold as an exterior trim and deck paint, an exterior [fol. 153] latex paint, an exterior oil-base house paint and an interior latex paint. These are the five classifications. I went out to these stores and bought the following manufacturers' offerings in the classifications: Pittsburgh, Sherwin-Williams, Glidden, and DuPont.

Q. Did Mr. Vedda—

A. And Mary Carter, of course.

Q. Did Mr. Vedda tell you what retail outlets to pick these up at?

A. No.

Q. You picked them up at outlets of your own choice and selection?

A. I looked them up in the red book the classified telephone directory.

Q. And you purchased paint samples that were being sold off the shelves of these stores, each of them?

A. That's right.

Q. Including Mary Carter?

A. Right.

Q. I show you four receipts, invoices, and I ask you whether those are the invoices which you received when you purchased the paint which you did.

A. Yes.

Mr. Sexton: Your Honor, I offer these in evidence as Respondents' Exhibits 10A, B, C and D.

Mr. Ferguson: I object, Your Honor on the ground of your exclusion.

[fol. 154] Mr. Sexton: How can we handle that, then? May we have these marked for identification then? It is understood that—

Hearing Examiner Tocker: Mark them for identification. They come within the excluded portion.

(The documents referred to were marked Respondents' Exhibits 10A, B, C and D.)

Mr. Sexton: Your Honor, the following testimony, I think, may not come within the exclusion. It will be just a brief few questions about the purchase of the Mary Carter paint and it relates to one of the points you made yesterday.

By Mr. Sexton:

Q. Here on the Mary Carter slip, Mr. Driscoll, it indicates that you bought a gallon of outside white and paid \$6.98 and that you also got a gallon of Rol-Latex. That you got free, it indicates on here. Is that correct?

A. Yes.

Q. Do you recall offhand what the price of the Rol-Latex paint was at that time?

A. No, except that the dealer in question who sold me the paint said it was around the same price range as the house paint and therefore it came within the category of one gallon free.

Mr. Sexton: Your Honor, we will put additional evidence in if you wish that the list price of Rol-Latex is, as a matter of fact, \$6.98. I guess that is already in evidence. Mr. Ferguson's man from Alabama bought Rol-Latex.

Q. Also, I note here that you bought a gallon of trim and deck paint for \$9.95 and that you got a gallon of marine outside white, liquid glass for free, is that right?

A. Right.

Q. Did the sales clerk make the same representation to you concerning the liquid glass?

A. Yes.

Mr. Sexton: As a matter of fact, Your Honor, we will put in evidence tomorrow, if necessary, that the liquid glass sells at \$8.98. That is the retail price on that. Mr. Davis will testify to that tomorrow.

Q. Mr. Driscoll, would you continue? You got all the

paints together and took them to your laboratory, is that correct?

A. Yes.

Q. Then what was done?

A. Well, I had one of my men, in the presence of an assistant from your office—

Q. Is that Miss Monahan?

A. Right.—open up each can of paint, stir it up thoroughly and pour a representative portion of it into a series of quart cans that we took out of stock, empty quart cans, and as he took each can and did this, Miss Monahan gave him a code number of which he kept a record, and he marked the code number on the can. When it was all over, this entire code was put in a sealed envelope in a safe repository, and we proceeded to test the paints in the quart cans without any reference to the code or to the original packages that they came in.

[fol. 156] Q. Then, when the paint was—during the test, the paint is painted on various panels, or some of the tests, and the figure that you would see on the panel would be the coded figure?

A. The code number only.

Q. Did you record the results of that test according to code number on this document, which has been marked as Respondents' Exhibit 7 for identification?

A. Yes, that is the chart that I made up. That is a copy of the chart.

Q. Is this the envelope, the sealed envelope?

A. Yes, I went in this morning. My assistant took it out and handed it to me.

Q. And Miss Monahan also had a list. Did you see it at the time?

A. No, I didn't even know she had it.

Q. She also had a list with the code on it and that is the basis for the documents that I have handed out here today.

A. Yes.

Q. Have you been told or do you know what the code numbers, each and every one of them, represents, or any of them represent?

A. No.

Q. Do you know what paint company's paint is represented by any of the code numbers?

A. No.

Q. Who else worked with you in getting the tests together and turning them out?

A. Well, during the course of this work I had it done by two assistants in the laboratory who prepared all of the charts and specimens for testing. They ran the test according to my directions, and then the results were handed [fol. 157] to me for interpretation and evaluation.

Q. So that each of the evaluations that appears on this chart is the evaluation that you made, is that correct?

A. Yes.

Q. Nobody else made those evaluations?

A. No.

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Q. Hold up on that since you don't have any results on the last two. Generally speaking, on the over-all, all of these tests, each of them may have shortcomings and so on, but over all you get a solid enough impression so that you can make a statement as an expert?

A. Well, for this reason: I have been evaluating paints in exactly this manner for the last 25 years, and I hope I am getting better at it every year. This is the only manner I ever use. If someone gives me a can of paint and says, "Match this," this is exactly what I do. When I get through with this sort of test, I practically know exactly what is in that paint, how much it costs and so forth. Another thing. I did this comparatively. I just didn't take one paint by itself, but in each classification I compared seven paints, four paints, five paints, six paints, and so forth, and the tests were run so that it was completely fair to every paint in that classification.

When you run a test that way, you can say—and you run this many tests—you can say with a great degree of assurance that these paints are comparable, or this particular paint is deficient. Also, most of these tests were performance tests, and the user of paint is interested only [fol. 158] in performance, or I would say certainly that is the most important thing he is interested in. He is interested in knowing, will this paint do the job it is supposed to do in every respect. We tested in 20-odd different respects to see that it will do the job. There is no chance

of one paint coming through this and then the test showed that this was a good paint but actually it isn't. That would be impossible.

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Cross-examination.

By Mr. Ferguson:

Q. Mr. Driscoll, when you testified yesterday I recall a question by counsel for respondent as to whether or not comparative tests of paint products by you were routine. As I recall your answer to that question, you said, "My main job is to formulate products in the paint field." Is that right?

A. Yes.

Q. Are comparative tests of paint routine in your work?

A. Yes.

Q. Are comparative tests of the type that you made for Mary Carter routine in your work?

A. Yes.

Q. How many such tests have you performed, Mr. Driscoll?

A. In what time period?

Q. In your career as a paint specialist, approximately.

A. I couldn't count them.

Q. Well, how many last year?

[fol. 159] A. I would say that in any average year I can expect to do, say, anywhere from fifty to a hundred of that type of comparative test.

Q. Yesterday you said that you had twenty to twenty-five clients. How many of these are in the paint field?

A. Well, they are all in the paint field, but I would say about fifteen to eighteen of those are paint manufacturers and the rest are raw material suppliers who sell their products to these manufacturers.

Q. Could you tell us who some of these people are?

A. Both categories?

Q. Yes.

A. Well, I work for Dutchmaster's, Production Coatings, Radar Paint, Allied Paint and Color, Prudential Paint, Ohmlac, Lee Paint, and I will skip to the raw mate-

rizi houses now. The raw material houses are Smith Chemical, Witco Chemical, Jersey State Chemical, U. S. Coatings, Farnow Varnish Works. That's a pretty good cross-section.

Q. Going back to the paint manufacturers that you named, could you tell us which ones you performed tests for last year?

A. All of them.

Q. Comparative tests?

A. Right.

Q. Such as this nature?

A. Right; because they give me products they want to match, or they submit a sample of their paint to me and they want me to evaluate it.

Q. I am talking of comparative tests of this type.

A. Yes.

Q. Specifically, were these tests where you went out and got paints of other manufacturers?

A. No.

[fol. 160] Q. And you didn't label them?

A. No.

Q. Then they were not exactly this type of test?

A. Wait a minute. If you talk about the test, they are exactly this type of test, but the circumstances surrounding the tests are different. There are no Court cases involved.

Q. I don't want to argue with you, Mr. Driscoll, but I think your statement is inconsistent. I asked you first if they were the same tests. Then you said that they were the same but differed. Are they exactly the same tests as you performed here for Mary Carter?

A. I don't want to argue with you, either, but they are exactly the same tests, but the circumstances are different, yes.

Q. And you submitted to them reports such as is marked here for identification, but excluded, as Respondent's Exhibit No. 7?

A. I usually submit a finished formulation. In other words, at the conclusion of my test I feel that this particular formulation would fulfill the requirements.

Q. And for those particular people for whom you are

making reports, you are making a formulation report; is that correct?

A. That's right. I also submit a sample. It is checked out by their own chemists and then it goes into production.

Q. I would like to go back to my previous question of you and ask if you have ever made this type of a test for any of your clients before.

A. You mean exactly this type, the circumstances and all?

Q. Yes, exactly this type.

[fol. 161] A. Well, I have been involved in Court cases before, yes. In other words, I will go out on a complaint where the quality of the product is in question and I have to prove in one way or another—

Q. And have you prepared a chart with these various qualifications?

A. Not necessarily a chart, because there weren't twenty-seven products involved. The only reason for the chart is that there is such a numerous number of comparisons made in this one case.

Q. When you perform tests of paints such as you performed here, what standards, if any, do you follow in making these tests? Do you follow any recognized standards in the paint field for making the test?

A. Well, they are based on recognized tests and standards in the paint field, but they are so subject to my own years of experience and interpretation of these things that I don't think they are exactly the same.

Q. Would it be a fair statement to say that you do not follow exactly any set standards in the paint field, but adhere mostly to your own experience?

A. Well, it is based on the standards, but according to my own interpretation, yes.

Q. You named in your chart, in your report, in your tests, which you described as comparative tests Glidden, Pittsburgh, Dupont, Sherwin-Williams, and you also mentioned Super Kemtone. Who makes that?

A. Sherwin-Williams.

Q. Have you ever performed any tests for these particular manufacturers?

A. Not for them, but I have run comparisons of their products with other people's products. We had this

[fol. 162] Dupont Lucite, which is a new product. I would say three of my customers asked me to evaluate it when it came out.

Q. Did you compare it with other paints for them in a similar test such as this?

A. That's right.

Q. Did you make a chart such as this?

A. No.

Q. We have something here that has been marked for identification, but excluded, as Respondent's Exhibit No. 11. I will ask if you can tell me for the record what that is, please.

A. Well, these are brush-outs of three of the seven interior latex paints that we tested in this series. The main object of these tests is to see the type of flow you get, so we put a roughly measured amount of paint on the tip of a brush and apply each of them in an identical manner and then let it stand so that we can see how the flow characteristics shape up.

Q. Is this generally done as a bring-down test?

A. You mean draw-down?

Q. Is this a brush stroke?

A. Yes, that is a brush-out, and the other is a draw-down, the other chart that I have here.

Q. I show you what is marked Respondent's Exhibit No. 12 for identification, but excluded, and I ask you if you can tell me what that is.

A. This is a test which I formulated, as a result of going out on other complaints, on the practical appearance of flat wall paints. Very often the ordinary laboratory brush-outs and draw-downs indicate that a paint is normal, there is nothing wrong with it. Then you go out on a job and the job looks terrible because there is a long wall with a [fol. 163] light source at the end and it looks patchy. You can see every brush mark and the color varies and the sheen varies.

I take these large porous charts and purposely brush the paint out in a non-uniform manner. In other words, we try to avoid brushing back and forth too much and evening it out. Then we purposely cross-brush and circle, and then we leave a piece bare, and the next day we coat over—that is, two coats on part of it.

My experience shows this will point up the difficulties you run into on an actual job when you tint the paint and you have a difficult surface.

Q. Is this a recognized test?

A. No; that is my own.

Q. Isn't it generally recognized that a test such as this sort is made on a hard surface rather than a porous surface?

A. I purposely pick a porous surface—

Q. I am asking you as to generally.

A. I just said that nobody else runs the test that I know of, so I cannot answer that.

Q. You mentioned in your test reports, as I recall a caustic test or a caustic resistance test. I ask you if this is a test which is generally recognized in the paint industry.

A. Yes. It is a solution of sodium hydroxide. The concentration varies from two percent to five percent depending on what you are testing. Of course, sodium hydroxide will react with various organic materials and form soaps. This becomes apparent—

Q. I think you testified as to what you did on it yesterday, but I am going to ask you, sir, if this is, as you described it in your testimony yesterday, a generally recognized test in the paint field.

A. Yes.

[fol. 164] Q. And is it followed as you described your performance of it yesterday in the testing of paints?

A. Yes.

Q. You testified yesterday as to certain scrubability tests. It is my recollection that you testified that some of the paints were scrubbed with Ajax cleanser and a rag?

A. Right.

Q. And some of the other tests were where the paints were subjected to other tests?

A. Right.

Q. Were they all subjected to the same tests?

A. Well, they were all subjected to the Ajax and the rag. In cases where I was in doubt and I would have had to repeat my results, I subjected them to the Gardner scrub machine test.

Q. The ones tested with Ajax, were they tested by the Gardner scrub machine too?

A. Some of them were repeated.

Q. Were they all tested exactly alike?

A. Well, those that were repeated were tested alike, yes.

Q. You say those which were. Some were not; is that correct?

A. Because there wasn't any doubt in my mind about the result. The Gardner test is a much more involved and time-consuming procedure.

Q. As far as the paints were concerned, some were given one test and some another; is that correct?

A. Well, they were all given one test which was comparable. Then I picked out a few and those few were run also comparable so far as the number of paints involved on the other test.

[fol. 165] Q. In performing these tests, I believe you testified yesterday that you had a number of assistants who performed the actual work concerned?

A. Right.

Q. Can you tell me how many assistants you had?

A. Well, I have a regular assistant who has been working for me for five years. He performed the greatest portion of the tests. Then I have my son working for me for the summer, more or less as errand boy, just making himself generally useful. Those tests that had to be prepared that didn't need the experience of the other man, I had my son perform.

Q. I gather your son is not a chemist or a qualified paint expert?

A. Well, he has had a pre-med course and he is in the second year of veterinary school and he knows as much chemistry as is necessary for the paint industry.

Q. He has no degree?

A. He has no experience in paint.

Q. How about the other man?

A. He is just a technician who has been working for me for a sufficient number of years so that he knows exactly how the tests run.

Q. And these two individuals performed the tests and you evaluated them; is that right?

A. That's right. In other words, they do the application according to my directions.

Q. What type of laboratory facilities do you have. Mr. Driscoll?

A. Well, it is a typical paint laboratory. I have a weight per gallon tub viscosimeters, an oven, a Gardner scrub machine, a reflectometer.

Q. Where is your laboratory located?

[fol. 166] A. It is located at 504 East 141th Street, the Bronx, above a paint plant.

Q. How large is it?

A. Well, it is about 15 x 20.

Q. And how long have you been in this location?

A. A little over ten years. This used to be a laboratory for the Payson Corporation, which moved out.

Q. And you work there exclusively?

A. No. I had my laboratory at the Amsterdam Color Works before that for three years.

Q. I mean now, at the present time.

A. This is my laboratory, but I do a lot of work in many laboratories. In other words every one of my accounts of any significance has their own laboratory, their own staff of chemists, and I very often do my work there.

Q. These particular tests about which you testified, you performed at this particular laboratory; is that right?

A. Yes, that's right.

Q. And these two gentlemen that are helping you, that helped you on these tests, are they your full-time staff?

A. Just one of them.

Q. You stated, I believe, that some of the paints that you used in your tests had been purchased for a study made for another client; is that correct?

A. Just one.

Q. Will you tell us who that client was?

A. Ohmlac.

Q. In your testimony yesterday, as I recall, you testified you were contacted by Mr. Vedda of Mary Carter for the purpose of making the tests that you have testified about? [fol. 167] A. Right.

Q. Did you do this under contract?

A. No. I don't have contracts with any of my customers.

Q. Are you paid for your work?

A. Yes.

Q. Are your assistants paid?

A. Well, I pay my assistants.

Mr. Ferguson: I believe that is all I have on cross examination.

Mr. Sexton: No further questions, Your Honor.

Hearing Examiner Tocker: I have a couple of questions. Would you go back to exterior house paints and tell us again which paint you evaluated as best and worst, conceding that they are all good paints?

The Witness: Well, there is a paint there with a weight per gallon of 12.3.

Hearing Examiner Tocker: Will you look at the chart so that you get the Roman numerals correct?

The Witness: You are talking about exterior house paints?

Hearing Examiner Tocker: Yes.

[fol. 168] The Witness: There are six of them. If you look at the weight per gallon you will see they are all over 14 except one. One of them is 12.3. That in itself is not sufficient to condemn a paint, except it showed that it is of a different type or nature than the others, so that it is not a standard type of paint.

In addition to that, you go to the top line and it shows poor packaging conditions, lumps of mixing. It also shows fair—in other words, it was poorer than the other goods. It shows very poor on flow.

The general appearance of the paints were similar. They were all made with raw linseed. There is a method of telling that from these charts by the degree of yellowing, the softness of the film, the tacky, dry and so on. But this particular paint, I felt, was not as good as the other five.

Hearing Examiner Tocker: And of the other five, which do you regard as best?

The Witness: I don't think I picked any one as being the best. I think three of them were all about equally good. No. XXI, I thought, was slightly poorer than the other three because of the packaging conditions, which doesn't indicate that it is poor in any respect except control, or it might have been accidental.

Any paint factory is entitled to one bad batch a year, and this might have been it. In that respect, it might not indicate anything.

Hearing Examiner Tocker: You wouldn't rate No. XXI as better than all the other five?

[fol. 169] The Witness: No. In that particular category there wasn't any paint that was outstandingly good. They were all good, and some of them had some characteristics I didn't like, so I mentioned it in my report.

Hearing Examiner Tocker: So the only outstanding thing about this batch was that No. XX would be regarded as outstanding because it was not as good as the rest of them?

The Witness: Well, the 12.3 weight per gallon is a tip-off that it is different. I immediately tried to see, because it was different, whether it was poorer or better in any other respect. Unfortunately, it wasn't better in any respect and it was a little poorer in quite a few, so I marked that as being inferior.

Hearing Examiner Tocker: That is all.

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VIRGIL H. VEDDA, was thereupon called as a witness for the Respondents and, having been first duly sworn, testified as follows:

Hearing Examiner Tocker: Will you please state your full name and address?

The Witness: Virgil H. Vedda, 106 Windward Island, Clearwater, Florida.

[fol. 170] Direct examination.

By Mr. Sexton:

Q. Mr. Vedda, would you state your position with the company?

A. I am vice president in charge of operations.

Q. How long have you been with the Company?

A. A year and-a-half.

Q. By "the company," I mean the Mary Carter Paint Company.

A. Approximately a year and-a-half.

Q. What are your duties as such?

A. I am in charge of research and development and of all manufacturing operations.

Q. Would you state for the record a brief summary of your education and business background?

A. I graduated from Columbia University in 1943 with a Bachelor's Degree in Chemistry, and I have been employed in the paint industry ever since. More specifically, I started with the Inal-X Company in Brooklyn, New York, and I was engaged in the development of alkyd resins, and after a period of two years in the Armed Forces I joined a company called Centro Research Laboratories and I was a group leader in charge of the development of specialized coatings for signal equipment.

In 1947 I joined the Sun Chemical Corporation as head of their control laboratories, and in 1949 I became manager of their Long Island City plant in charge of all manufacturing operations.

In 1952 I went to Canada as technical director of a large multi-plant paint operation, and in 1953 I became a vice president—

[fol. 171] Q. What is the name of that?

A. Brandram-Henderson. I became vice president in charge of research and development and manufacturing until the latter part of 1959.

Mr. Sexton: Your Honor, we propose at this time to go into certain questions on quality control and give Mr. Ferguson the opportunity of making the record here.

Mr. Ferguson: If it please Your Honor, I think the record on the exclusion of testimony related to quality is pretty clear. However, I would ask, if this witness testifies as to quality, anything in connection with the quality of respondent's paint products, that his testimony be excluded.

Hearing Examiner Tocker: This is the same type of objection. It is like the motion to dismiss a complaint or a motion to strike the defense.

The basis is that regardless of how fine a quality this paint is, assuming it is the best quality paint in the world, it is still irrelevant to the issues in this case?

Mr. Ferguson: That is correct, Your Honor. I think I made my position clear on the record in the first instance. It would be repetitious to go into it again. It is outside the scope of the complaint.

Hearing Examiner Tocker: The same ruling. You are allowed to proceed for the purpose of making a record. [fol. 172] Mr. Sexton: Actually, before I do get to the specific qualities, I have one or two more questions about background.

By Mr. Sexton:

Q. Are you and have you been a member of various technical societies and paint societies, and could you name some of them?

A. Yes. I was director of the protective coating division of the Chemical Institute of Canada. I was president of the Montreal Paint and Varnish Production Club and director for many years of that organization. I have been a member of the Canadian Government Advisory Specification Board.

Q. On that point, would you describe somewhat as to what the Board's function was?

A. Some time around 1954 the question of procurement of paint for the government became quite burdensome due to the fact that the government laboratories were not equipped to test in a given period of time the products that were submitted to them. Therefore, the various government agencies were left without paint.

The Canadian Paint, Varnish and Lacquer Association, in connection with the Department of National Defense, undertook to appoint from industry several members who would form a practical board which would set up not only procurement procedures, but standard procedures, so that it would become possible for the government to purchase their requirements directly from standard lines of paint manufacturers rather than rely on involved government specifications.

Q. In other words, standards for practical comparative evaluation of paints?

[fol. 173] A. Right. As such, subcommittees were formed to set up practical tests.

Q. And you did that?

A. Yes.

Q. I think that is enough detail on that.

A. I have been a guest speaker at several technical meetings. I have from time to time written technical

papers, and I have been quite active in the paint and chemical field throughout my career.

Q. Turning to Mary Carter Paint Company, can you give the Examiner a description of the quality controls used by Mary Carter, beginning with the certifications of raw materials?

A. The practice of control is two-fold: Raw material control and finished goods. To start with raw material control, we purchase our ingredients from the largest and most reputable companies in the United States and we require a certificate of analysis on every shipment of material that enters our plants. This certificate of analysis has to be in our hands prior to unloading or receiving the material that comes in.

Q. I show you three documents, one on the letterhead from the Borden Company, which I will have marked for identification as Respondents' Exhibit 15; the second, a document on the letterhead of Reichhold Chemicals, which I will ask be marked as Respondents' Exhibit 16 for identification; and third, a document on the letterhead of C. Withington Company, which I will ask to have marked as Respondents' Exhibit No. 17 for identification.

(The documents referred to were marked Respondents' Exhibits 15, 16 and 17 for identification.)

[fol. 174] Mr. Sexton: First I will show these to counsel for the Commission, who has not previously seen them.

Mr. Ferguson: If it please Your Honor, I consider these as evidence going to the quality of the product. Any offer would be objected to by me as not in issue in this complaint and outside the scope of the complaint.

By Mr. Sexton:

Q. I show you those three Respondent exhibits for identification which we have just marked, Mr. Vedda, and I ask you to describe them and say how they fit into your quality control procedures.

A. These are certificates which precede incoming shipments of raw materials. More specifically, Exhibit 15 relates to an acrylic resin.

Q. Without going into that in any further detail, is it

fair to say that these are representative samples of certificates that you receive?

A. Yes, they are.

Q. Do you receive certificates like this from all of your suppliers?

A. No, we don't.

Q. In the cases where you don't receive such certificates, what do you get?

A. We do receive a letter from an officer of that company guarantying that the material that they ship to us meets a required specification which is outlined in said letter.

Q. What is the next step after receiving these certificates in your quality control procedure?

A. A control chemist receives a sample of all incoming materials and, depending on their importance, they are [fol. 175] checked in order to determine whether or not they meet our standards, and then the results that are obtained are compared with the certificates of analysis and with our specifications and a running record of these tests is kept at all times so that we can identify the material throughout our process.

Q. What are those tests, chemical analyses or what?

A. They have to be related to the material themselves for pigments, for example, brightness, ease of dispersion, opacity, and if it goes into a major line it is checked in a specific paint to see how it performs. If it is a liquid, such as an alkyd resin, physical characteristics such as color, viscosity, weight per gallon, acid value, et cetera, are checked.

Q. Did you bring with you any samples of the records that you make on checking these raw materials?

A. Yes, I did.

Mr. Sexton: I will offer for identification here as Respondents' Exhibit No. 18 a card that is entitled "Mineral Spirits," with various numerical entries having been made on the card.

(The document referred to was marked Respondents' Exhibit 18 for identification.)

Mr. Sexton: I show that exhibit to Mr. Ferguson.

Mr. Ferguson: I have the same objection, Your Honor.

[fol. 176] Hearing Examiner Tocker: The same ruling.

By Mr. Sexton:

Q. What is that card generally? Would you describe it?

A. This is a typical card which represents the test that are conducted whenever we receive a sample of mineral spirits, which is one of the most common solvents that we use in conjunction with the manufacture of many of our products. This is just a running record of shipments and specific chemical and physical aspects of the product as it is received.

Q. What happens if you find out that the product does not meet the specifications certified or does not meet the specifications?

A. It is not accepted. If it is a question that can be debated, it is put aside until a specific answer is received from the supplier.

Q. Mr. Vedda, what is the next quality control step along the production line?

A. Well, actually, there are two. There is what we call in situ control, which is done at the plant level, directly on the manufacturing floor, and this control is exercised in order to check the primary physical characteristics of our products as they are being manufactured. More specifically, color, grind, weight per gallon, viscosity, et cetera, are checked at the plant level.

Q. One gallon of paint in every batch?

A. The operator goes to the manufacturing tank and draws a sample from the manufacturing tank and he checks it. The next step is that a gallon from a particular batch goes into the central control laboratories and then it is given a complete check-up, a repetition of the tests that [fol. 177] were done in the plant plus such tests as accelerated aging to determine shelf condition.

Many products are checked through a spectrophotometer to check continuity of color matching. Many batches are brushed out on actual surfaces of various porosities to determine the working properties, and all these results are recorded, in addition to retaining a sample of this particular batch which is stored in a suitable place where it can be examined at any time.

Q. How big is a batch, Mr. Vedda?

A. The average sized batch is one thousand gallons.

Q. Do you also do certain weather tests on your paints?

A. Yes.

Q. What are those?

A. Realizing that accelerated weathering is just a means of giving us an indication of what may happen, we maintain a very complete test fence where different types of wood or masonry surfaces are coated and exposed at various degrees to the weather.

Q. You mean the fence is tilted at various degrees?

A. Yes. We have a north vertical, a south vertical, and a 45-degree south. The reason for the 45-degree south exposure, especially in Florida, is that you can assume that a 45-degree south exposure is equivalent to about three years of actual vertical exposure. These panels are examined periodically and there is a running history not only of our products, but products of the future and present competitive products on the market.

We also periodically paint a number of houses. I would say that right now in the Tampa area there are approximately fifteen to twenty houses painted with either paints [fol. 178] which we are contemplating making or paints of actual and past production.

Q. Do some of your suppliers do tests on your paint formulas, too?

A. Very much so.

Q. Would you describe that to the Examiner?

A. I would not want to give the impression that most paint manufacturers are involved in doing basic theoretical research, but perhaps the right terminology is "applied research." As such, raw material suppliers of magnitude come to us with several products suggesting their introduction into our lines.

Based on our evaluation, we very often adopt their methods, and then the paint in turn is sent to these companies and the paint is tested in their laboratories and exposed on their fences for a permanent record.

Q. By formula?

A. Yes, by formula.

Mr. Sexton: Your Honor, at this time I would like to go into a rather extensive comparative test which Mr. Vedda

recently supervised. Perhaps this would be a good point to break, if it meets with your convenience.

Hearing Examiner Tocker: I will break, but I am just wondering, even bearing in mind my duty to report excluded testimony, if it is necessary to go into the detail which you indicated it was your intention to go.

Will you give that some consideration, because when you start I might have to make a ruling on it.

[fol. 179] Mr. Peck: How long do you expect this to take, Mr. Sexton?

Mr. Sexton: At least another half-hour.

Hearing Examiner Tocker: Heretofore, it was my understanding that all I had to take was an offer of proof. This, of course, goes far beyond an offer of proof. The question is how far beyond it do I go.

Suppose we take a ten-minute recess now.

(Recess taken.)

Hearing Examiner Tocker: Back on the record.

By Mr. Sexton:

Q. You testified that you keep samples of every batch in the laboratory; is that correct?

A. Yes, we do.

Q. What do you use those samples for?

A. They are kept as references so that from time to time we can refer back to them and examine the condition of a particular line of paint.

Q. Do you ever use them in connection with complaints?

A. Yes, they are also used in connection with complaints.

Q. As a matter of fact, is the volume of complaints another check you have on the quality of the paint you are putting out?

[fol. 180] A. Yes, it is. We get complete reports on all sorts of complaints on a weekly basis.

Q. You have testified to your experience in the industry. What would you say the Mary Carter volume of complaints is compared to the volume of complaints generally in the industry?

A. I would say about one-fifth. In other words, Mary Carter complaints run below one percent, and in the in-

dustry if a line runs below five percent it is believed to be a good line.

Q. Now we go to the subject of the most recent comprehensive test that you conducted. Would you describe how many people work for you, how you supervise them, and so forth?

A. Periodically, we perform comparative tests of competitive products against our own. Some time in November we decided to elaborate on the scope of the test and include long-range testing, which is still in process. Exclusive of myself, there were six people involved: a technical director, a chief chemist, and four people who actually perform the testing at the batch site.

Through a memorandum of mine, I authorized the technical director to proceed with the tests. He, in turn, authorized the chief chemist to go out and buy competitive paints.

Q. And that was done?

A. Yes, it was done.

Q. At the regular retail stores?

A. Yes. The paints were purchased in the Tampa area.

Q. As for the Mary Carter paints tested, where were they obtained?

[fol. 181] A. The Mary Carter paints were obtained on memo from one of our largest paint stores in Tampa.

Q. You got them also from the retail store?

A. That's right.

Q. About how many hours was put in on this test of your laboratory and research people?

A. Well, four men worked on it continuously for four months, exclusive of supervisory time.

Q. Were the paints tested blind?

A. Yes, with the exclusion of the fact that the technical director, the chief chemist and myself knew the codes, but the people that performed the tests did not know the codings of the paints.

Q. Did you do any evaluations?

A. I looked at a lot of tests which were the combined judgment of three people, which is better than one; in other words, boarderline cases, plus the fact that I wanted to supervise certain aspects of certain lines by myself.

What happened in a couple of instances was that one

particular competitive paint showed up very, very poorly, and it came from a nationally recognized good house. We could not conceive that this was a norm. It was actually a batch that must have been miscanned or manufactured under adverse conditions. I authorized the personnel to repurchase the can and start that particular phase of the test over because we didn't feel that it would be a fair evaluation to have a very substandard material in the line. I felt from my experience that this could not be the average that I would find in that line.

Q. Was that done?

A. Yes, it was.

Q. On this blind matter, did you also tell me something else that probably should be in the record here?

[fol. 182] A. Yes. Experience is a great teacher, and I would say that half-way through the test some of the technicians were able to identify maybe thirty percent of the products that they were working with because of being familiar with certain odors that are present in some of our competitive paints, certain masking compounds that we use in our own manufacturing, certain pertinent characteristics which are not apparent to the layman, but to the experienced person they are quite evident.

Q. Do you believe that that awareness in any way influenced the test readings?

A. I don't believe so, because most of the tests were done by instrumentation and instruments react the same way under all conditions, so the readings were actually taken four times and rechecked.

Mr. Sexton: I ask this document to be marked for identification as Respondents' Exhibit No. 19, entitled "Report on Competitive Paint Test."

(The document referred to was marked Respondents' Exhibits 19-A, B, C, D, E and F for identification.)

Mr. Sexton: It is understood, Your Honor, that this will also be among the excluded evidence.

By Mr. Sexton:

Q. Does that Exhibit No. 19 for identification accurately report the results of the test?

A. Yes, it does.

[fol. 183] Q. What are the names of the four persons up in the right-hand corner?

A. They are the people that actually performed the tests.

Q. And did the evaluations?

A. No. The evaluation was done by the chief chemist, the technical director and myself.

Q. What is the chief chemist's name?

A. Tom Marek, and the technical director's name is R. Brown.

Q. The first page there describes the types of tests. I show you a document which I would like to mark as Respondents' Exhibit No. 20 for identification.

(The document referred to was marked Respondents' Exhibits 20-A, B, C, D, E, F, G, H, I, J, K, L, M and N for identification.)

By Mr. Sexton:

Q. Respondents' Exhibit 20-A to N is what, Mr. Vedda?

A. This is a copy of the test methods that we adopted in our control laboratories.

Q. This is the methods you adopt generally; is that right?

A. That's right.

Q. Did you use these methods on the tests recorded in Respondents' Exhibit No. 19?

A. Yes.

Q. Did you use tests in addition to them?

A. Yes, we did.

Q. Were the tests you used tests which you can state as an expert would be generally recognized as valid comparative tests in the industry?

A. Yes, I would say so.

[fol. 184] Q. Could there have been more extensive tests?

A. No.

Q. Except on such things as weather?

A. I stated before that the weathering tests on the exterior panels are still going on and they are being read periodically, and conclusions cannot be made for a period of eighteen months at least.

Mr. Sexton: In line with your comments, Your Honor, we won't go through these tests and have him describe each one.

Q. Mr. Vedda, do you think there are any tests here which are either different from those described by Mr. Driscoll, significantly different, or are not discussed in Respondents' Exhibit 20, which you think you should at least make some mention of as to either the machine you used, the measuring system?

A. I wouldn't say so. I didn't know what tests Mr. Driscoll was going to make or how he was going to evaluate it. It became a question of choice in trying to follow procedures which we had set out. I would say there wasn't any great difference between the tests we performed to achieve the results brought out by the tests. In the scrub resistance, we relied entirely on a Gardner scrub machine.

Hearing Examiner Tocker: Well, maybe I can sort of abbreviate this. In Exhibit No. 20, you show the results; is that right?

The Witness: That's right.

[fol. 185] Hearing Examiner Tocker: You have a point score which brings paint "D", which is Mary Carter under the A, B, C, D, at 735, which is the highest point score. You show that the lowest point score could have been as low as 204, but none of them went down that low. Generally speaking, with respect to the individual paints on the preceding pages, the numerals for quality are on the up side?

The Witness: Yes.

Hearing Examiner Tocker: So that it won't be necessary to get a greater elucidation of this exhibit should it ultimately become of importance. Again, I say that this is only my reaction. Others will look at this file, perhaps. If you feel my reaction is not proper in line with the ruling, you may go ahead.

Mr. Sexton: I have only one more point to bring out here.

By Mr. Sexton:

Q. This scale of values, Mr. Vedda, was it adopted before or after the tests?

A. The scale?

Q. Yes.

A. It was adopted before, based on experience and customer acceptance of products. In other words, what does the customer like best. Based on that, we assigned empirical values to the different tests that were performed, well realizing that it is a debatable issue whether scrub [fol. 186] cycles are more important than sand abrasion and vice versa. They have to be related to each specific product.

Q. In any event, you made the evaluation?

A. Right.

Q. And you made it before you knew the results?

A. Right. We decided to assign certain numerical values to each test.

Q. The general result of the test has been stated by His Honor and appears clearly from the exhibit.

Have you found elsewhere in your work additional confirmation of the general conclusion that Mary Carter paint is of a quality comparable to other first-line national-brand paints?

A. Yes. I visit company stores very often to get a reaction on how particular lines are moving. By and large, the people that I talk to are people who have run out of one particular paint and are coming back to get a re-match, or people who have painted their house before and are coming back. I would say, by and large, most of the people I talk to are people who are coming back and are repeat customers.

Q. Have you, as a matter of business procedure, had other checks, independent test checks, which confirm the general conclusion which you reached in this test and which I believe you operate under?

A. Yes. In the past year the American Hotel Association gave their approval on certain of our products based on some independent tests that they had done by one of the leading testing houses in the United States.

Q. What is the meaning of that seal?

A. That seal means that according to approved test

methods the Mary Carter products that were submitted [fol. 187] meet the minimum standards of the specifications; in other words, that any hotel that is a member of the Association had buy these particular products because they know that they have been tested and they are approved.

Hearing Examiner Tocker: Mary Carter is not the only one that has this. You said minimum?

The Witness: Yes.

Hearing Examiner Tocker: In other words, it provides a choice?

The Witness: That's right.

By Mr. Sexton:

Q. Have you seen copies of their test results? Did they send them to you?

A. Yes, I did.

Mr. Sexton: I offer this document as Respondents' Exhibit No. 21-A and B, entitled "Foster D. Snell, Inc."

(The document referred to was marked Respondents' Exhibit 21-A and B for identification.)

By Mr. Sexton:

Q. Are the tests described therein somewhat similar to the ones that you conducted?

A. Yes, they are.

[fol. 188] Q. And are the results consistent, recognizing the generality? Are they consistent with the results that you reached?

A. Yes, they are.

Hearing Examiner Tocker: The American Hotel Association test applies only to Mary Carter's interior China Lux, not to the entire line; is that correct?

The Witness: We submitted several products, Your Honor.

Mr. Sexton: That is my mistake. It applies to various lines. I can ask the witness what those lines are.

Hearing Examiner Tocker: Well, the general tenor of the testimony that I got before seeing the proposed Ex-

hibit 21 was that all of the Mary Carter products had been certified by the American Hotel Association. If that is not so, the record should be clear.

Mr. Sexton: Yes, Your Honor. I gave you a copy of what I thought was Exhibit 21-A and B. Actually, it was another copy of a test on another paint.

Hearing Examiner Tocker: Just let the witness tell what products are American Hotel Association products and what are not.

The Witness: If I recall, we submitted to the American Hotel Association our interior latex, our interior semi-[fol. 189] gloss, our interior flat, and our interior enamel. I'm not sure we submitted any exterior samples, but those I am sure of.

Mr. Ferguson: I would like to make one statement at this time, if I may. I realize that this testimony as to the quality of the product is under your ruling on exclusions. However, I believe that all of this is in the nature of a proffer, and as to a test which was not performed by this gentleman or by his assistants, I believe that he is incapable of testifying to that report of that test.

If they want to make a proffer of what the person who made this test would testify to, I believe they can do it, but not through this witness.

Hearing Examiner Tocker: He is not going to testify as to the details of the tests. He is only going to testify that, as to these particular paints which he has mentioned, they received the H.A.A. approval.

Is that correct? Does that take care of the objection?

Mr. Ferguson: Maybe I am anticipating, but if he going into the mechanics of this particular test which was not performed by him or under his direction, I would object to that.

Hearing Examiner Tocker: It would be sustained, but it is not necessary, apparently.

[fol. 190] Mr. Sexton: I was going to qualify these. I can ask Mr. Vedda if he is familiar with Foster Snell's reputable laboratory and if these reports were submitted in the regular course of business and if he himself relied on them.

They are offered to show that there is nothing incon-

sistent in them which would tend to undercut the conclusions which he reached from the tests he did.

Hearing Examiner Tocker: Let the record show that, if given the opportunity, counsel would have submitted additional evidence of a corroborative nature and the Hearing Examiner rules that, particularly in the posture in which this entire line is being offered, the additional corroborative testimony is not necessary.

Mr. Sexton: I wonder if we could also mark these additional A.H.A. tests here, also under the rule of your exclusion.

Hearing Examiner Tocker: As part of your offer, yes.

Mr. Sexton: We can call these Respondents' Exhibits 21-C through J, inclusive, for identification.

(The documents referred to were marked Respondents' Exhibits 21-C, D, E, F, G, H, I and J for identification.)

[fol. 191] By Mr. Sexton:

Q. Did you also receive corroboration of your tests—describe any further corroboration of your tests that we received.

A. Yes. We received a Good Housekeeping seal of approval for our products.

Q. Could you describe the steps that the Good Housekeeping people took before they would grant that seal, to your knowledge?

A. One of their technical representatives came to our main plant in Tampa.

Q. What was his name?

A. Truman Henderson. He requested the following: Number one, to see eight houses that had been painted with our products; second, to go through our complete control procedures, both in raw material procurement and at the finished goods stage; next, to see our manufacturing procedures and control of the finished products, and he wanted to see several company stores in order to see the way the paint was sold. He also wanted to see how many complaints we were getting and how complaints were being handled.

The gentleman spent approximately four days at our

plant and he followed each of the steps that I have spoken of in detail.

Q. Did you receive the Good Housekeeping seal?

A. Yes, we did.

Q. I show you an advertisement—

Hearing Examiner Tocker: Wait a minute. What is the Good Housekeeping seal?

The Witness: Well, the Good Housekeeping seal testifies as to the quality of a product.

[fol. 192] Hearing Examiner Tocker: Who is Good Housekeeping?

The Witness: Good Housekeeping is a nationally recognized publication.

Hearing Examiner Tocker: Is it a trade publication?

The Witness: It is a trade publication.

By Mr. Sexton:

Q. Is Good Housekeeping a trade publication, Mr. Vedda?

A. I would say a national publication.

Hearing Examiner Tocker: Is it like one of your scientific journals?

The Witness: Definitely not. It is a consumer publication. It is one of the leading consumer publications in the country.

Hearing Examiner Tocker: Does it give tips on consumer needs?

The Witness: No.

Hearing Examiner Tocker: Well, what is a typical issue of Good Housekeeping?

[fol. 193] The Witness: It has menus for the housewife, how to remove weed from the lawn, how to build a TV cabinet or a stereo set.

Hearing Examiner Tocker: Does it have stories, too?

The Witness: Yes, there are some stories.

Hearing Examiner Tocker: In other words, it is a magazine of general circulation?

The Witness: That's right.

Hearing Examiner Tocker: What is the seal?

Mr. Sexton: We do have a copy of the contract which states what the seal represents and the conditions under

which it is given. I offer that for identification. Perhaps that will speak for itself.

I offer that as Respondents' Exhibit No. 22-A, B and C for identification.

(The document referred to was marked Respondents' Exhibit 22-A, B and C for identification.)

Hearing Examiner Tocker: The same objection and the same ruling.

[fol. 194] By Mr. Sexton:

Q. In order to get the seal, you have to advertise in Good Housekeeping; is that correct?

A. Yes, you do.

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Q. As a man acquainted with the paint industry, have you found confirmation of your results and of your determination as to the quality of Mary Carter paint in the sales of Mary Carter paint?

A. Yes, I have.

Q. Is there anything special which makes that sales record of Mary Carter's particularly impressive in your mind as a business man and as a paint industry expert?

A. Yes. Repeat business has been the key to the success of the company, and I attribute that to the fact that the public is value-conscious.

Q. Is there anything in the market which would tend to inhibit the sales of Mary Carter paint, a factor which other paint companies might not have to face up to?

A. Will you repeat that, please?

Mr. Sexton: Read the question, please.

(Question read.)

Hearing Examiner Tocker: Try to reframe the question.
The Witness: I don't understand the question.

[fol. 195] By Mr. Sexton:

Q. Are there competitive pressures which make Mary Carter's paint showing particularly impressive to you?

A. A fantastically impressive record, I believe, has

been achieved in view of the fact of all outside pressures that we have had, which pressures have attacked individuals and quality and merchandising methods and so on and so forth, but the public comes back and buys the paint because they know it is a good paint.

Q. What is the source of some of those pressures you have described?

A. Well, Better Business Bureaus throughout the country have been saying that we were selling junk and deceiving the public with junk. Actually, they did it verbally and pictorially. In my tenure of office with the company I have seen some ridiculous charges from the Paint and Varnish Association.

Q. Is that the National Paint, Varnish and Lacquer Association?

A. Ridiculous both in content and technically. I have seen reports of quality which were misleading and inaccurate. Pressures have been exerted on technical personnel of Mary Carter denying them the right to belong to recognized technical associations, and so on and so forth.

Q. I won't pursue that any further except on this point about the Better Business Bureaus. I believe it was Mr. Van Worp's testimony that wherever Better Business Bureaus had been challenged on the quality point, they had backed down. Is that correct, Mr. Vedda?

A. Yes. For the past six months we have not been challenged as to the quality of product.

[fol. 196] Mr. Sexton: Your Honor, I have now ended the excluded testimony area.

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Cross-examination.

By Mr. Ferguson:

Q. As I recall your testimony about some tests which you performed or had performed, you testified that as to the coating tests—it is my understanding from your testimony that you used a fence which is constructed of various types of wood upon which to apply your coating tests; is that correct?

A. Right.

Q. What would your opinion be as to the use of wood or wood fiber or board such as gypsum board for testing coatings? Is that the generally accepted way that coating tests are made in the paint industry?

A. We have to relegate it to specific finishes. The exterior paints are applied on surfaces that go on the exterior of houses. If gypsum board were to be used for flashing, we would put paint on gypsum board.

Q. You testified as to your qualifications for testing paint. I will ask you what, in your opinion, should be used as far as standards in testing paint. Do you believe that standards recognizable in the paint industry should be used in the tests that are made of paint products?

A. If you could define such standards, yes. Let me say that if all paint manufacturers were to agree on standards, yes.

[fol. 197] Q. Don't you believe that there are certain standards which are generally recognized in the paint industry for testing paint?

A. Yes, there are.

Q. And when you conduct tests of paint products, would it be your opinion that these standards should be applied in testing paint?

A. Partly, yes. Some of the tests that are presently outlined in a written form by the American Society of Testing Materials are obsolete and out-dated.

Q. I am going to ask you one more question, sir:

When you are in charge of, or when you test comparative paints, do you have anything to do with making opinions on comparative paints, on tests that are performed under your knowledge and your direction? Are the paints which are tested all subjected to the same tests?

A. I would say yes.

Q. And it is your opinion that they should be subjected to the same tests?

A. Yes. Otherwise, the tests would be meaningless.

Q. Going to the Good Housekeeping seal which you testified about, I believe you said that the man came to see you from Good Housekeeping?

A. Yes.

Q. And that he examined the paint?

A. Yes.

Q. You testified as to how it was done?

A. No, I didn't testify that he examined the paint.

Q. He examined your processes?

A. Right.

Q. Was Mary Carter advertised in Good Housekeeping at that time, do you know?

A. No.

[fol. 198] Q. And Mary Carter, as I understand it, is now advertising in Good Housekeeping; is that correct?

A. Yes.

Q. To your knowledge, if Mary Carter did not advertise in Good Housekeeping would it have the Good Housekeeping seal?

A. No.

Q. Does Mary Carter pay for the advertising that appears in the Good Housekeeping magazine, to your knowledge?

A. Yes, they do.

Q. What would your opinion of someone who performed a test of a paint product who applies assumption in reaching a conclusion, who would report that the products more or less conformed to certain standards?

A. It would entirely depend on the experience of the individual.

Q. Do you think that a conclusion should be based upon an assumption or upon the direct evidence of the test?

A. Both.

Q. Do you think that a "more or less" statement is something upon which you could base a conclusion in a report that you would make as to the quality of a paint?

A. If certain products were so close to each other, I would say more or less; but if there were some specific differences, I would have to state so.

Mr. Ferguson: I believe that is all I have, Your Honor.
[fol. 199] Mr. Sexton: I have no questions on re-direct as to the excluded matter. Let this be the dividing mark, hopefully, between excluded and included.

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IRVING GEORGE DAVIS, JR., was thereupon called as a witness for the Respondents and, having been previously duly sworn, testified as follows:

Direct examination.

By Mr. Peck:

Q. You are the president of the Mary Carter Paint Company; is that correct?

A. Yes, sir.

Q. And its chief executive officer?

A. By actual definition, the chairman of the board is the chief executive officer of our company, but it is my responsibility for the total operations of the company.

Q. And you have held that position since when, Mr. Davis?

A. I have been president since December 22nd, 1960.

Q. Will you state in your own way, Mr. Davis, what I would call the pillar of the Mary Carter pricing, marketing and advertising policy is?

A. It is our objective to, first of all, give the public the greatest possible value for their money in the products we sell. We, in fact, believe most strongly that we give to the public double the value that they receive in the purchase of comparable products.

[fol. 200] With that objective in mind, we undertake to present this double value to the public in the most direct, clear and graphic method of presentation that we believe possible. In the fact of, you might say, propaganda campaigns by large segments of the industry to convince the public that low-priced paint, as they refer to, a cheap paint cannot be good quality paint and cannot use good quality base ingredients—in the face of this propaganda or this campaign to imbed this thought into the public's mind, we feel that the most direct and honest way to present to the public our double value is by pricing our product at a level to compete with other recognized quality nationally advertised brands and giving a second can free with the purchase of one of our products.

Q. Will you tell us whether, according to your observation and study, the public psychology, which you refer

to as having been inculcated, as relating price to quality, actually exists?

Mr. Ferguson: I object to that, Your Honor. I don't think he is qualified to testify to that.

Hearing Examiner Tocker: Well, it is a conclusion that there is a public psychology. The question is based on the assumption that there has been properly admissible testimony to that effect. I don't think it can be supported on that basis. I will have to sustain the objection.

Mr. Peck: If Your Honor please, aside from the inculcation, which is a fact, a man who is a president of a paint company is certainly qualified out of his own experience [fol. 201] to talk about what the public psychology is in the purchasing of paint.

I submit that there is no question that if this man says that he can testify to it, as the head of a company engaged in the marketing of paint, he is entirely qualified to testify to what he has found the public psychology to be.

Mr. Ferguson: This gentleman is not an expert on public psychology. He is a paint president. Probably he is very well informed as to his actual duties for his own company.

Hearing Examiner Tocker: Well, he hasn't been in the paint business very long, either.

When did you go into Mary Carter?

The Witness: Last December 1st, but I would suggest that perhaps my answer to such a question would be based on literally hundreds of years of experience accumulated amongst our employees, who report directly to me.

Hearing Examiner Tocker: Well, there was offered yesterday a survey. Have you any survey as to preferences based on price?

The Witness: No, we have no formal survey on such a matter. But we do have—I have, in my exposure through our stores, through our dealers, found an unqualified feeling and experience that the public does relate the quality of paint to price.

[fol. 202] If I might cite examples of where, if a customer has been dissatisfied, they will bring it back and compare the product to other national brands that are sold at the same level at which we price our paint.

Hearing Examiner Tocker: I am going to sustain the

objection, but I am going to ask a couple of questions at this point.

Is it your belief and the belief of the other people who are concerned with the management of Mary Carter that the public makes its purchases of canned paint on the basis of price as a determining factor for desirability?

If you want an objection to that question, you may object, Mr. Ferguson, but I will overrule it.

Mr. Ferguson: I think it is a conclusion, Your Honor. I would object to it.

Hearing Examiner Tocker: The objection is overruled.

The Witness: It is our demonstrated experience that the public makes their purchase of paint on the basis of value, which is a combination.

Hearing Examiner Tocker: Answer my question.

The Witness: Do they make it on the basis of price?

[fol. 203] Hearing Examiner Tocker: Yes.

The Witness: They are suspect of low-priced paint, yes. That is our clear belief.

Hearing Examiner Tocker: And is that the reason why you have adopted a pricing policy which has been the subject of testimony in this case?

The Witness: Precisely.

By Mr. Peck:

Q. Will you state whether or not for any product there is one price or more than one price for Mary Carter paint?

A. For each Mary Carter product there is one and only one price to all customers. That price is standard in every Mary Carter outlet. It is standard in every Mary Carter advertisement, and no violation of that single price for any reason is permitted by the company.

Q. Can anyone buy a can of Mary Carter paint for less than the published advertised price?

A. No, sir.

Q. Can anyone get any discount on the purchase of any Mary Carter paint?

A. No, sir.

Q. For quantity or otherwise?

A. No discount for any reason.

Q. Do people buy single cans of Mary Carter paint, either a quart or a gallon?

[fol. 204] A. You mean do they sometimes not accept the free can?

Q. Well, whether you say they don't accept or what. From your own knowledge, do people come in and buy a single quart or a single gallon of Mary Carter paint?

A. Well, every sale we make is a sale of a can, and the second can is offered free.

Q. I am talking about buying and walking out with a single quart or a single gallon.

A. There have been occasions where the customer has refused or neglected to take the free can that is offered with every purchase, yes, sir.

Q. When anybody buys a single quart or a single gallon, what price does he pay for it?

A. He pays the advertised price.

Q. Do you make a particular point of doing everything you can to see that this pricing policy of yours is observed?

A. Yes, sir.

Q. Quickly run over for us what you do.

A. We indoctrinate every one of our employees thoroughly in the policies and pricing practices of our company. We further supervise the activities. I should also say that we also fully indoctrinate franchised dealers. Secondly, we have a field organization of over thirty men who are constantly servicing, calling on our stores, impressing upon them the mandatory adherence to our policies.

In addition, we periodically send bulletins to the dealers stressing our policy and adherence to the same. As Mr. Van Worp testified yesterday, we have in the past employed the services of shopping services to check up on our own stores, franchise dealers and company stores, as to their adherence.

[fol. 205] In addition, we are shopped by other factors in the industry and the reports of those other factors come back to us indicating that our policy is very closely adhered to.

Q. By "other factors in the industry," what do you mean?

A. Competitors, the Better Business Bureau; occasionally—and this is hearsay, but I understand members of the F.T.C.

Mr. Ferguson: I object to any hearsay.

Hearing Examiner Tocker: The objection is overruled. There has been testimony here that the F.T.C. investigator accompanied a witness to buy some Mary Carter paint.

The Witness: If the testimony is acceptable, it is hearsay. If it is true—

Hearing Examiner Tocker: Please, Mr. Witness, don't argue with counsel. I have made a ruling.

By Mr. Peck:

Q. Will you continue?

A. Members of the F.T.C. Other employees of our company who are not in the sales organization frequently will shop franchise dealers by whom they won't be known or recognized. In summary, we do everything in our power to not only maintain adherence to this policy of a single price, but to police it.

[fol. 206] Q. If you learn that any store or any dealer is violating this price policy, what do you do about it?

A. We issue them an immediate warning that if such practice is not terminated immediately they will lose their franchise. We are empowered to take away their franchise for such cause.

Q. Have you canceled franchises for that reason?

A. Yes, sir.

Q. How many of them?

A. We have canceled, in my tenure, one franchise in Puerto Rico who, after sufficient warning, continued the policy of selling a single gallon at half price. We took his franchise away.

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Cross-examination.

By Mr. Ferguson:

Q. Mr. Davis, there seems to be a little contradiction in your testimony, to me, as to this fact of the gallon can or the quart can being sold other than at your policy price. I believe you stated that it had been done and that people had actually been fired for having sold a gallon, say, for \$4.50, or a quart can for less than \$2.25. Is that right?

A. Would you repeat what I said?

Q. As I understand your testimony, you said that you did not recall any such instances, that there had been occasions where people had gone in and had not wanted the can, the second can, but they had always paid the \$6.98 or the \$2.25. Then, later on, you testified that actually units had been sold at a lower price than \$6.98 and that people had been fired for it. Is that correct?

[fol. 207] A. No. I think you are confusing two elements of the testimony. What I recall that I said and what I intended to say was that we do not permit any item to be sold at any of our stores for less than the advertised price.

In a rare instance—and in my experience and in the experience of our other employees of the company, it is rare—in a rare instance where a violation of that policy is found, in the case of, say, a franchise dealer, we will issue a strong warning to immediately cease such practice, and if such practice is not ceased he is disenfranchised.

In the case of an employee, if an employee is found to be breaking that policy or any other policy of the company, we would naturally take such action as would be appropriate for breaking any company policy.

Q. Let us go now to your gallon. Your advertised price generally for your leading paint is \$6.98 a gallon; is that correct?

A. That's the price we have been using as representative, yes.

Q. A gentleman can come into your store, a customer, and he can pay \$4.50 for two quarts of paint?

A. That is correct.

Q. And he can walk out of that store with a gallon?

A. No, he cannot walk out of our store—as I testified at a previous hearing, he cannot walk out with a gallon of paint. He can walk out with four quarts of paint if he so desires by accepting the two quarts that we offer free with the two that he purchased.

Q. And your stand is, then, that two quarts plus two quarts is not a gallon?

[fol. 208] Mr. Peck: I object to that. This has been gone over and made perfectly clear.

Hearing Examiner Tocker: I think the testimony is clear. A gallon is referred to as a package as distinguished from a quantitative element.

Mr. Ferguson: I believe that is all I have, Your Honor.

Mr. Peck: I have no further questions.

Hearing Examiner Tocker: Maybe this should have been asked of Mr. Van Worp before we let him go, but who dreamt up this idea of one gallon free or one quart free?

The Witness: According to my understanding, it was the founders of the company.

Hearing Examiner Tocker: Well, did they have outside advertising counsel or agencies or did the paint men themselves think it up, as far as you know? This is strictly the worst kind of hearsay, I know.

The Witness: To the best of my knowledge, it was Mr. Van Worp, Sr., who was the founder of the company, who is responsible for this advertising and merchandising policy. [fols. 209-216] Hearing Examiner Tocker: Do you have an advertising agency now?

The Witness: Yes, sir. We have a New York advertising agency, Ellington and Company.

Hearing Examiner Tocker: And this is an agency which is not a unit of the company?

The Witness: No, sir; it is completely independent. They handle many, many other accounts, sizable accounts.

Hearing Examiner Tocker: But the one gallon free or one quart free is not their idea?

The Witness: No, sir.

Hearing Examiner Tocker: This is historical more than anything else?

The Witness: Yes, sir.

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[fol. 217] BEFORE THE FEDERAL TRADE COMMISSION

Respondents' Exhibit Nc. 2

Prospectus

"This prospectus furnished as a matter of information only and not as the basis of an offering of any security."

250,000 Shares

MARY CARTER PAINT Co.

Class A Common Stock

(Par Value \$1 Per Share)

THESE SECURITIES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION NOR HAS THE COMMISSION PASSED UPON THE ACCURACY OR ADEQUACY OF THIS PROSPECTUS. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

Of the 250,000 shares of Class A Common Stock offered hereby, 50,000 shares are being purchased by the Underwriters from the Company on original issue and 200,000 shares are outstanding and are being purchased by the Underwriters from certain stockholders referred to herein under "Selling Stockholders". The Company will receive no part of the proceeds of the 200,000 shares being sold by the Selling Stockholders.

The Class A Common Stock was quoted in the over-the-counter market at \$9½ bid and \$9¾ asked on November 15, 1960 as reported by the National Quotation Bureau, Inc. See "Price Range and Dividends" for the price range since May 6, 1960.

	Price to Public	Underwriting Discounts and Commis- sions (1)	Proceeds to Com- pany (2)	Proceeds to Selling Stock- holders (2)
Per Share.....	\$9.25	\$.74	\$8.51	\$8.51
Total.....	\$2,312,500	\$185,000	\$425,500	\$1,702,000

(1) The Company has agreed to indemnify the Underwriters against certain civil liabilities, including liabilities under the Securities Act of 1933. The Underwriters will pay a finder's fee of \$12,000 to Proctor, Cook & Co., which has advised that it will pay 60% of this fee to one of its employees, James C. Vogt, who is the brother-in-law of William M. Crosby, an officer and director of the Company and a Selling Stockholder. The Selling Stockholders have agreed not to sell any shares of either Class A Common Stock or Common Stock, other than those offered by this Prospectus, for a period of 90 days from the date hereof.

(2) Before deducting expenses payable by the Company and the Selling Stockholders estimated at \$36,000 and \$37,000 respectively.

These securities are offered when, as and if sold to and accepted by the Underwriters, and subject to approval of certain legal matters by counsel for the Underwriters and counsel for the Company and the Selling Stockholders. It is expected that delivery will be made at the office of Lee Higginson Corporation, 20 Broad Street, New York 5, New York on or about November 25, 1960.

LEE HIGGINSON CORPORATION

The date of this Prospectus is November 16, 1960.

[fol. 218] This Prospectus does not contain all the information set forth in the Registration Statement which the Company has filed with the Securities and Exchange Commission, Washington 25, D. C. For further information with respect to the Company and the securities offered hereby, reference is made to the Registration Statement, including the exhibits thereto and schedules filed as a part thereof.

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“This prospectus furnished as a matter of information only and not as the basis of an offering of any security.”

IN CONNECTION WITH THIS OFFERING, THE UNDERWRITERS MAY OVER-ALLOT OR EFFECT TRANSACTIONS WHICH STABILIZE OR MAINTAIN THE MARKET PRICES OF THE CLASS A COMMON STOCK AND THE COMMON STOCK OF THE COMPANY AT LEVELS ABOVE THOSE WHICH MIGHT OTHERWISE PREVAIL IN THE OPEN MARKET. SUCH STABILIZING, IF COMMENCED, MAY BE DISCONTINUED AT ANY TIME.

No dealer, salesman or other person has been authorized to give any information or to make any representations other than those contained in this Prospectus. If given or made, such information or representations must not be relied upon as having been authorized by the Company, any Selling Stockholder or any Underwriter. This Prospectus does not constitute an offer or solicitation by anyone in any state in which such offer or solicitation is not authorized or in which the person making such offer or solicitation is not qualified to do so, or to any person to whom it is unlawful to make such an offer or solicitation.

[fol. 219]

The Company

The Company* has been engaged since 1951 in the manufacture, for direct distribution to outlets at the retail level, of various paint products. It currently operates three

* Mary Carter Paint Co. was incorporated in Delaware on October 24, 1958, as a wholly-owned subsidiary of Crosby-Miller Corp. (previously known as Berlin Chapman Company), a Wisconsin corporation which for many years had carried on a manufacturing, foundry and metal working business in Berlin, Wisconsin. On September 15, 1958, Crosby-Miller sold all of its assets, other than real estate, cash and accounts receivable, and on December 3, 1958, purchased 80% of the capital stock of Mary Carter Paint Factories, a New Jersey corporation organized in 1950, and 100% of the capital stock of Southern Resin Corporation, a Florida corporation organized in 1956. Southern Resin Corporation was liquidated into Crosby-Miller on January 6, 1959, and on January 30, 1959, Crosby-Miller was merged into its wholly-owned subsidiary, Mary Carter Paint Co. Effective October 31, 1960, Mary Carter Paint Factories was merged into Mary Carter Paint Co. Unless the con-

manufacturing plants in Florida, New Jersey and Texas, and its products are sold in 28 states. Sales are made chiefly through franchised dealers, and the Company prefers to operate in this manner, but where necessary for proper market coverage it establishes its own sales outlets. The following table indicates the development of the Company's business since 1955:

	Net Sales	At End of Period		
		No. of Franchised Dealers	No. of Company Stores	Total No. of Outlets
1955.....	\$1,295,545	5	24	29
1956.....	2,158,033	16	30	46
1957.....	3,658,858	57	47	104
1958.....	5,425,236	125	62	187
1959.....	8,363,420	262	63	325
Six months ended				
July 3, 1959.....	3,825,390	192	64	263
July 1, 1960.....	5,787,533	366	72	438

Expansion Program and Use of Proceeds

The Company is presently engaged in an expansion program. In addition to establishing a new manufacturing plant in Conroe, Texas at a cost of approximately \$250,000, which commenced operations in June 1960, the Company plans to construct, equip and stock a manufacturing plant in southern California at an approximate cost of \$275,000. Although the actual site has not yet been selected, construction of the southern California plant is expected to begin in late 1960 or early 1961. The Company is also considering expansion of the Conroe plant and establishment of new manufacturing facilities in the Mid-West area and in New Jersey, the latter to replace the existing plant in Matawan, New Jersey, but the dates on which these projects will be initiated and the amounts to be expended on them have not yet been decided and will depend upon future sales and development of the Company's business.

Of the net proceeds to be received by the Company from

text otherwise requires, the term "Company" herein means Mary Carter Paint Co. and subsidiaries and includes Mary Carter Paint Factories and subsidiaries, as well as Southern Resin, for the period prior to January 30, 1959.

its sales of 50,000 shares of Class A Common Stock offered hereby, \$225,000 will be used initially to pay the balance now outstanding on a bank loan incurred in 1960 to make payment of the final portion of the purchase price of the 80% interest in Mary Carter Paint Factories which the Company acquired in 1958, and the balance will be applied to the cost of constructing, equipping and stocking the new southern California plant. The Company expects to obtain any balance required for the southern California plant and [fol. 220] for the remainder of the expansion program from operations or, if necessary, from short-term borrowings.

Capitalization

The following table sets forth the capitalization of the Company at November 1, 1960, and as adjusted to reflect the issuance and sale of the 50,000 shares of Class A Common Stock being sold by the Company and the application of proceeds therefrom:

	Authorized	Outstanding November 1, 1960	As Adjusted
Mortgages payable (a).	—	\$263,157	\$263,157
Short term bank loans.	—	\$225,000	—
Common Stock			
(\$1 par value).....	600,000 shs.	572,244 shs. (b)	572,244 shs. (b)
Class A Common Stock			
(\$1 par value).....	2,000,000 shs.	1,450,444 shs. (b)	1,500,444 shs. (b)

(a) See Note 5 of Notes to Consolidated Financial Statements for due dates, interest rates and amortization payments of these mortgages.

(b) Does not include 9,000 shares of Common Stock and 68,000 shares of Class A Common Stock reserved for issue upon exercise of stock options heretofore granted. See "Restricted Stock Options" under "Management" for a description of these outstanding options.

Price Range and Dividends

Since June 22, 1959 in the case of the Common Stock, and since the issuance on May 6, 1960 of the Class A Common Stock as a 200% stock distribution on the Common Stock, there has existed a quoted market for each class of stock in the over-the-counter market. The range of the highest daily bid prices for the periods shown below, as reported by National Quotation Bureau, Inc., was as follows:

	Common Stock		Class A Common Stock	
	High	Low	High	Low
1959				
June 22—December 31...	26½	14	—	—
1960				
January 1—May 5.....	27½	22	—	—
May 6—November 15...	12¼	9½	12	9¼

The bid and asked prices on November 15, 1960 were 9½ bid and 9¾ asked for the Common Stock and 9½ bid and 9¾ asked for the Class A Common Stock.

The Company has paid no cash dividends since its incorporation in 1958. Prior to its merger into the Company, Mary Carter Paint Factories paid a number of cash dividends but there was no regularly established dividend policy. It is contemplated that for the immediate future earnings will be retained for use in the business.

[fol. 221] Consolidated Statement of Earnings

The following consolidated statement of earnings, in so far as it relates to the three years and six months ended July 1, 1960, has been examined by Price Waterhouse & Co., independent public accountants, whose opinion thereon appears elsewhere herein. In the opinion of the Company, all adjustments, consisting only of normal recurring adjustments, necessary for a fair statement of the results for the six months ended July 3, 1959 have been made. The statement should be read in conjunction with financial statements and notes thereto included elsewhere in this Prospectus.

	Year ended December 31,				Six months ended	
	1955	1956 (Unaudited)	1957	1958	1959	July 3, 1959 (Unaudited) July 1, 1960
Net sales.....	\$1,295,545	\$2,158,033	\$3,658,858	\$5,425,236	\$8,363,420	\$3,825,800 \$5,787,533
Other income.....	2,946	3,139	2,830	18,085	57,307	29,716 20,622
	1,298,491	2,161,172	3,661,688	5,443,321	8,420,727	3,855,106 5,808,155
Cost of sales (exclusive of depreciation).....	747,092	992,985	1,711,579	2,569,089	4,295,076	1,991,874 3,057,620
Selling and administrative expenses.....	465,142	669,982	1,094,076	1,650,370	2,309,128	1,051,229 1,619,770
Depreciation.....	1,196	18,653	55,409	71,982	129,828	61,073 89,025
Interest expense.....			3,839	4,865	31,475	15,709 13,620
Other deductions.....	3,267	1,918	496	454	2,611	290 313
	1,216,697	1,683,538	2,865,399	4,296,760	6,768,118	3,120,175 4,780,348
Earnings before income taxes.....	81,794	477,634	796,289	1,146,561	1,652,609	734,931 1,027,807
Income taxes:						
Federal.....	37,944	255,089	380,142	561,227	839,331	378,215 519,500
State.....		1,108	5,596	7,918	11,530	5,791 6,895
	37,944	256,197	385,738	569,145	850,861	384,006 526,395
Net earnings.....	\$ 43,850	\$ 221,437	\$ 410,551	\$ 577,416	\$ 801,748	\$ 350,925 \$ 501,412
Net earnings per share (Note B).....	\$.02	\$.12	\$.22	\$.32	\$.43	\$.19 \$.25

The Company paid no cash dividends during the year 1959 or the six months ended July 1, 1960.

Notes:

A—As explained in Note 1 of Notes to Consolidated Financial Statements, the Company (through one of its predecessors) disposed of certain phases of its operations in 1958 and through cash purchase in 1958 and merger in 1960, acquired the paint manufacturing and sales operations conducted by Mary Carter Paint Factories and subsidiaries and Southern Resin Corporation. The paint operations now constitute the principal business of the Company, and accordingly the above statement shows throughout the period the combined operations of the companies constituting the existing paint business.

B—Earnings per share for each period are based on the average shares of Common Stock and Class A Common Stock outstanding during the period after giving retroactive effect to 1960 stock distributions and shares issued on the merger.

[fol. 222]

Business and Property

Products

The Company manufactures, for direct distribution to outlets at the retail level, a full line of quality exterior and interior paints, enamels and sealers of the type used by the household consumer. It also purchases and packages stains and varnishes for resale. These products, with minor exceptions, are sold under the trade name "Mary Carter" and accounted for approximately 89% of the Company's net sales in 1959. In addition, the Company sells paint accessories and sundries manufactured by others. This category of products, which accounted for the remaining 11% of the Company's net sales in 1959, includes brushes, ladders, masking tape, paddles, rollers and roller kits, sandpaper, shellacs, solvents and steel wool.

Distribution

The Company's products are sold in 28 states, Puerto Rico and the British West Indies. As of November 1, 1960 there were 534 sales outlets (an increase of 96 since July 1, 1960), of which 455 were operated by franchised dealers and 79 were operated by the Company. These outlets are located primarily in the Southern and Eastern states with the greatest concentration in Florida and the other Gulf Coast states. With the commencement in June 1960 of the operation of its manufacturing plant in Texas, and the proposed construction of a plant in southern California, the Company expects to broaden the area in which its products are distributed. Large increases in the number of outlets, particularly in areas where the Company's products had not theretofore been sold, involve substantial initial advertising and other start-up expenditures, substantially all of which are charged to current operations.

All sales outlets but one operate under the Mary Carter name. Almost exclusively, these outlets handle only Company merchandise and sell at uniform prices on a cash-and-carry basis. Shipments to outlets are made from the Company's plants in Company-owned or leased motor vehicles, and dealers are normally required to have paid for the

immediately preceding shipment before the delivery of a new shipment. The business of the Company is seasonal and in the past has usually been larger in the second half of the year.

The Company has an active recruiting program to obtain suitable franchised dealers, and maintains a staff which devotes itself principally to matters concerning the retail outlets. Members of this staff assist newly-franchised dealers as well as new Company-owned stores to commence operations, and thereafter maintain liaison with them. Each franchised dealer supplies the capital for his store and inventory. Company-owned stores are owned and operated by wholly-owned subsidiaries of the Company, and generally occupy space under leases, none of which expires later than 1966.

The table under "The Company" indicates that, with the accelerated growth in the number of outlets in recent years, there has been a relative decline in annual net sales per outlet, based on outlets in operation at the end of the period. This is attributable in part to the fact that total sales for the year include sales of outlets added in such period only from the respective dates of opening such outlets. To some extent, however, the decline also reflects the following factors: (1) about three years are usually required before a newly opened outlet reaches its full sales potential; (2) the number of franchise outlets has increased at a more rapid rate than Company-owned stores and, because of the Company's discount structure, a smaller contribution is made to the Company's net sales by franchise outlets than by Company-owned stores; and (3) the addition of new outlets in a community which already has outlets generally spreads sales among the stores so as to decrease the net sales per store.

[fol. 223] Mary Carter products are advertised extensively by the Company and its franchised dealers chiefly in local newspapers, over radio and television, and through distribution of handbills and samples. The Company pays 50% of all approved advertising undertaken by franchised dealers. It is the regular merchandising practice of the Company to give each customer one additional can of paint for each can he purchases, and in advertising Company products stress is placed on the theme that every

second can of paint is free. Since the inauguration of this practice some years ago, certain groups including other persons in the paint industry have attacked the Company and this practice.

In 1955 the Federal Trade Commission, with the consent of the Company, entered a cease and desist order which, essentially, prohibits the Company from making statements in its advertising, except for factual statements, with respect to the savings to the consumer from the purchase of its paint products and the quality of such products. From time to time the Company has filed reports and other supplementary data with the Commission with respect to its compliance with such order, and the Company believes it has so complied. In April 1960 the Commission, through its Atlanta office, undertook an investigation for the stated purpose of determining whether the Company is engaged in false and misleading advertising or deceptive practices contrary to Section 5 of the Federal Trade Commission Act. The scope of the investigation includes the advertising by the Company that one free can of paint is given to a customer for each can that he buys. The Company has been submitting data relative to the investigation in response to requests from the Commission. The Company is not able to determine what the effect upon its business would be if it should be prohibited from continuing to advertise that it gives a free can of paint with every can purchased.

The paint industry is highly competitive. A large number of companies in the United States manufacture and sell paint products similar to those of the Company, and some of these companies have substantially greater sales and resources than the Company. On a nationwide basis the Company is not an important industry factor, and its net sales in 1959 represented less than 1% of total sales of paint and paint products of all kinds in the United States during that year.

Property

The Company's executive office is maintained in leased quarters at 666 Fifth Avenue, New York 19, N. Y.

The Company's Tampa, Florida and Conroe, Texas manufacturing plants, both of which were constructed to its

specifications, were completed in 1957 and 1960, respectively. The Tampa plant, which is located on a site of approximately 10 acres, was enlarged in 1960 and now contains approximately 64,000 square feet of space. It is owned free and clear of any mortgage or other material encumbrance. The Conroe plant is located on a site of approximately 12 acres and contains approximately 10,000 square feet of space. It is subject to a mortgage, in the amount of \$75,000 as of July 1, 1960, which is being paid off in monthly installments with a final payment of \$41,111 due on May 30, 1962. The Matawan, New Jersey plant, which is located on a site of approximately 7 acres, was erected in 1946 and contains approximately 16,000 square feet of space. It is subject to a small mortgage.

[fol. 224] The approximate annual production capacities of these plants, based on a one-shift, 40-hour week operation, are as follows: Tampa, 4,000,000 gallons; Conroe, 1,000,000 gallons; and Matawan, 1,500,000 gallons. It is presently contemplated that the annual production capacity of the proposed new plant in southern California, computed on the same basis, will be approximately 1,000,000 gallons.

A central laboratory is operated at the Tampa plant and is in the process of being enlarged. It is engaged in paint research and product development, improvement of manufacturing techniques and quality control. Samples of each day's production are thoroughly tested to meet the Company's quality standards.

The Company also owns a tract of approximately 20 acres in Berlin, Wisconsin, improved with a manufacturing plant and related facilities, at which the Company (under its then name of Berlin Chapman Company) had carried on its manufacturing, foundry and metal working business prior to the sale of that business to Consolidated Foundries and Mfg. Corp. on September 15, 1958. The property is subject to a mortgage, in the amount of \$195,475 as of July 1, 1960, which is being paid off in monthly installments with the final payment due on July 15, 1967, and the property is leased to Consolidated Foundries under a long-term net lease dated September 15, 1958, expiring September 14, 1968, under which the lessee is responsible for all maintenance and repairs, payment of real estate taxes and insurance premiums, and payment of rent of \$33,500 per

year for the first 10 years and \$40,000 per year for the last 10 years. The lessee has an option to purchase the property at any time after September 15, 1963 and prior to September 15, 1978 at a purchase price of \$310,000 up to September 15, 1968 and thereafter at \$200,000. Mr. John C. Miller, President of the Company until November 1, 1960 and now a director and a holder of 12.66% of the Company's Common Stock and 9.99% of its Class A Common Stock,, is a Vice-President of Consolidated Foundries, but was not employed by that corporation at the time the above lease was entered into.

Materials and Supplies

The principal raw materials used by the Company are chemicals, driers, oils, pigments and solvents, all of which it purchases. It also purchases cans as well as paint accessories and sundries. It has experienced no difficulty in obtaining any of these materials or supplies.

Employees

The Company has over 370 employees of whom approximately 120 are engaged in production and 250 are engaged in administrative and sales activities. There are no union contracts in effect covering any of its employees. It considers that its employee relations are generally favorable. Recently, however, a charge was filed with the National Labor Relations Board by Local 522 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America alleging that the New Jersey manufacturing subsidiary of the Company was engaging in unfair labor practices within the meaning of Section 8(a) of the National Labor Relations Act, arising out of the discharge of two employees. The Company has filed an answer denying all allegations of unfair labor practices, and a hearing thereon is scheduled for November 22, 1960. In the interim, negotiations to effect a settlement are in progress. The plant at Matawan, New Jersey, was picketed by two members of Local 522 for a short time and while some inconvenience was caused by the incident, it did not interfere with the full and orderly operation of the plant. In an election under the jurisdiction of the National Labor

Relations Board, the employees entitled to vote rejected the union.

[fol. 225]

Management

The directors and executive officers of the Company are:

Name	Office
John F. Crosby*	Chairman of the Board and director
James M. Crosby*	Vice-Chairman of the Board, Vice-President and director
Robert Van Worp, Jr.	President and director
William M. Crosby*	Vice-President, Treasurer and director
Robert B. Emerson	Vice-President
Virgil H. Vedda	Vice-President
Henry B. Murphy	Secretary and director
Charles L. Rice	Controller
John F. Crosby, Jr.*	Director
George A. Horton	Director
John C. Miller	Director
Thomas S. Murphy*	Director
Lowell Thomas	Director
Reginald L. Vayo	Director

* Member of Executive Committee

Mr. John F. Crosby has been Chairman of the Board and a director of the Company or of Berlin Chapman Company for over five years.

Mr. James M. Crosby has been an officer and director of the Company since December 1958. He is also the President of Unexcelled Chemical Corporation. Between May 1958 and December 1958 he was engaged in business brokerage activities and prior to that time he was with Harris Upham & Co. for over five years.

Mr. Robert Van Worp, Jr. has been employed by the Company or Mary Carter Paint Factories in an executive capacity for over five years.

Mr. William M. Crosby has been employed by the Company or by Mary Carter Paint Factories since March 1959. For approximately five years prior to that time he had been employed by St. Regis Paper Company in various capacities, including that of Eastern Pulp Sales Manager.

Mr. Robert B. Emerson has been employed by Mary Carter Paint Factories since December 1957. Prior to that time he was in the United States Air Force.

Mr. Virgil H. Vedda joined Mary Carter Paint Factories in March 1960 and is in charge of research and product

development. For seven years prior to that time he was employed by Brandram Henderson Company, Ltd., paint manufacturers in Montreal, Canada, starting as Technical Director and advancing to the position of Vice-President.

Mr. Henry B. Murphy has been an officer and director of Mary Carter Paint Factories and a director of the Company since December 1958. He is also the President of Trenton Chair Company and has been an executive of that organization for over five years.

Mr. Charles L. Rice has been employed by Mary Carter Paint Factories since March 1960. For three months prior to that time he was assistant to the treasurer of Unexcelled [fol. 226] Chemical Corporation, and from May 1957 to December 1959 he had been employed as an auditor by Price Waterhouse & Co. Prior to that time he was in the United States Air Force.

Mr. Van Worp was elected a director, and Messrs. Van Worp, Emerson, Vedda, Henry B. Murphy and Rice were elected as officers effective upon the merger of Mary Carter Paint Factories into the Company on October 31, 1960. Prior to that time Mr. John C. Miller was President and Mr. Thomas S. Murphy was Secretary of the Company.

Remuneration

The following table sets forth the remuneration paid during the year 1959 to each director and officer of the Company or of any of its predecessors or subsidiaries whose aggregate direct remuneration exceeded \$30,000 and to all directors and officers as a group:

Name	Capacities in which remuneration was received	Aggregate direct remuneration
John F. Crosby	Chairman of the Board	\$ 31,250.00
Robert Van Worp, Sr.	President of Mary Carter Paint Factories (see below)	70,366.98
Robert Van Worp, Jr.	Vice-President and later President of Mary Carter Paint Factories (see below)	72,958.73
All officers and directors as a group		206,275.71

Mr. Robert Van Worp, Sr. was the President and a director of Mary Carter Paint Factories prior to his retirement on October 15, 1959. Pursuant to an employment agreement dated December 3, 1958 he was entitled to receive

a basic salary of \$48,000 per year and a bonus of 3% of the first \$1,000,000 in excess of \$100,000, and 2% of the balance, of the net income before federal income taxes of the Mary Carter paint business for each calendar year. When he retired, his total compensation for the year 1959 was adjusted to 80% of the total remuneration he would have been entitled to receive had he continued in employment during the whole year. Mr. Van Worp, Sr. has been employed by the Company as a consultant at a salary of \$25,000 per year since January 1, 1960 under a written contract which expires on December 31, 1964.

Mr. Robert Van Worp, Jr. was a Vice-President of Mary Carter Paint Factories until October 15, 1959, and thereafter its President. Pursuant to an employment agreement dated December 3, 1958 he was entitled to receive a basic salary of \$30,000 per year plus a bonus computed at the same rates and in the same manner as the annual bonus to which Mr. Van Worp, Sr. was entitled prior to his retirement. A new employment agreement was entered into, effective as of October 31, 1960, under which Mr. Van Worp, Jr. is entitled to the same basic salary and substantially the same bonus arrangement but with a total limit of \$100,000 per year after the year 1960, and extending the term of his employment from December 31, 1961 to December 31, 1962, with an option on the part of the Company to terminate the agreement as of December 31, 1961.

Mr. William M. Crosby, Vice-President, Treasurer and director of the Company, receives a salary of \$20,400 a year, payable in equal monthly installments, pursuant to an employment contract, dated November 13, 1959. After January 1, 1961, such salary may be altered as may be agreed upon from time to time by the Company and Mr. Crosby. As a part of such employment contract, Mr. Crosby received the option referred to below under "Restricted Stock Options."

The Company has no pension or retirement plan nor is there any bonus plan in effect which is applicable to executive officers or directors, other than the contract with Mr. Van Worp, Jr. described above.

Restricted Stock Options

There are currently outstanding restricted stock options, as defined in Section 421 of the Internal Revenue Code of 1954, to purchase shares of Common Stock and Class A Common Stock, heretofore granted to Mr. William M. Crosby and Mr. Robert Van Worp, Jr. The options are exercisable only by the optionee while in the employ of the Company or within one month after the termination of such employment for any reason other than death. If the optionee dies during his employment or during the one-month grace period, the option may be exercised by his legal representative at any time within three months from his death or the termination of his employment, whichever first occurred. In each instance the option price is slightly above 110% of the market price of the particular stock at the time the option was granted and the number and type of shares covered by the option are subject to adjustment under certain conditions.

Mr. Crosby's option, granted on November 13, 1959, entitles him to purchase 9,000 shares of Common Stock and 18,000 shares of Class A Common Stock at \$6.68 per share for each class of stock, or a total of \$180,360, at any time prior to November 13, 1964. Based on the average of the bid and asked prices in the over-the-counter market on November 15, 1960 (\$9.625 for the Common Stock and \$9.625 for the Class A Common Stock), the market values of the stock covered by the options were \$86,625 for the 9,000 shares of Common Stock and \$173,250 for the 18,000 shares of Class A Common Stock, or a total of \$259,875 for both classes.

Mr. Van Worp, Jr.'s option, granted on July 14, 1960 and approved by stockholders on October 25, 1960, entitles him to purchase 50,000 shares of Class A Common Stock at \$11.97 per share or a total of \$598,500. The entire option may be exercised at any time, but the option terminates as to 15,000 shares if not exercised prior to July 14, 1963, terminates as to an additional 15,000 shares if not exercised prior to July 14, 1964, and terminates as to the remaining 20,000 shares if not exercised prior to July 14, 1965. Based on the average of the bid and asked prices of \$9.625 for the Class A Common Stock in the over-the-

counter market on November 15, 1960, the market value of the Class A Common Stock covered by Mr. Van Worp, Jr.'s option was \$481,250.

Acquisition of Predecessor Companies

As set forth elsewhere herein, the company is a successor by merger to Crosby-Miller Corp., which caused the incorporation of the Company for the purpose of enabling Crosby-Miller to do business as a Delaware corporation under the name Mary Carter Paint Co. This was accomplished by merging Crosby-Miller into the Company on January 30, 1959. Pursuant to the merger, the Company received all the assets and assumed all the liabilities of Crosby-Miller, and issued 512,500 shares of its \$1 par value Common Stock to the stockholders of Crosby-Miller at the rate of 50 shares for each share of Crosby-Miller common stock held by them. Crosby-Miller and Mr. John F. Crosby, in his capacity as Chairman of its Board of Directors and a controlling stockholder, may be considered promoters of the Company as such term is defined in the General Rules and Regulations of the Securities and Exchange Commission. Mr. John F. Crosby, as a stockholder of Crosby-Miller, received shares of the Common Stock of the Company upon surrender of his stock in Crosby-Miller on the same basis as all other stockholders of Crosby-Miller.

On December 3, 1958 and prior to the merger above referred to, Crosby-Miller purchased from Mr. Robert Van [fol. 228] Worp, Sr. and his wife, Mr. Robert Van Worp, Jr. and his wife, and Mrs. Jean Spencer, a daughter of Mr. and Mrs. Van Worp, Sr., an aggregate of 80% of the outstanding capital stock of Mary Carter Paint Factories, 100% of the outstanding capital stock of Southern Resin Corporation, and certain real and tangible personal property which was then under lease to one or the other of said corporations. The total purchase price was \$2,480,000 in cash of which \$1,980,000 was paid on December 3, 1958, and \$500,000 was paid on April 15, 1960. The Company is informed that all of these assets had been acquired by the respective members of the Van Worp family more than two years prior to December 3, 1958. Effective October 31, 1960, Mary Carter Paint Factories was merged into the Company. Pursuant to the merger, the Company is-

sued 6,244 shares of Common Stock and 318,444 shares of Class A Common Stock to the owners (including members of the Van Worp family) of the then outstanding 20% interest in Mary Carter Paint Factories. These 324,688 shares represent approximately 16% of the total Company stock outstanding at November 1, 1960. The exchange ratio was determined on the principle that the interest of the stockholders of the Company in its per share earnings should not be diluted, while at the same time the minority holders in Mary Carter Paint Factories should receive an interest in the merged enterprise not substantially less than their interest in the earnings of Mary Carter Paint Factories prior to the merger. The average of the bid and asked prices in the over-the-counter market on October 31, 1960 was \$10.25 per share for the Common Stock and \$9.625 per share for the Class A Common Stock.

The Company leases from corporations owned by Mr. Robert Van Worp, Sr. or by Mr. Robert Van Worp, Jr. three store locations in Tampa, Florida, and one store location in Miami, Florida, all of which are occupied by Company-owned stores. The total rent of these four premises is \$11,664 per year. The terms of the leases vary, the longest being a five year lease expiring on February 29, 1964, but in each instance the Company has an option of renewal. In the opinion of the Company the rent payable under these leases is the fair and reasonable rental value of the premises.

On December 3, 1958 an option was granted to Mr. James M. Crosby to purchase 750 shares of Crosby-Miller common stock at \$143 per share or a total of \$107,250. The option price was 110% of the fair value of the stock at the time the option was granted. After giving effect to the merger of Crosby-Miller into the Company, this option entitled Mr. Crosby to purchase 37,500 shares of the Company's Common Stock at \$2.86 per share or a total of \$107,250. Pursuant to the 1958 option agreement, the basis for determination of the amount of Company Common Stock covered by Mr. Crosby's option after the merger was the same basis used by the Company in issuance of its Common Stock for the Crosby-Miller common stock (50 shares of Company Common Stock for each share of Crosby-Miller common stock). Mr. Crosby exercised his option on

December 30, 1959, at which time the average of the bid and asked prices of the Company's Common Stock in the over-the-counter market was \$27.25 per share of a total of \$1,021,875.

Principal Stockholders

The following information with respect to stock ownership is stated as of September 9, 1960, after giving retro-active effect to the merger of Mary Carter Paint Factories into the Company on October 31, 1960. The only persons owning of record or known by the Company to own beneficially more than 10% of each class of stock were:

[fol. 229] Name and Address	Type of Ownership	Common Stock		Class A Common	
		No. of sha.	%	No. of sha.	%
John F. Crosby 111 Lorraine Avenue Spring Lake, N.J.	Record and beneficial	245,300	42.86	490,800	33.83
John C. Miller 168 N. Adams Avenue Berlin, Wisconsin	Record and beneficial	72,500	12.66	145,000	9.99
Robert Van Worp, Sr. Oldemar, Florida	Record and beneficial	692	0.12	35,292	2.43
	Beneficial (1)	2,950	0.51	150,450	10.37

(1) Including shares held by trusts created by Mr. Van Worp in which he retained a reversionary interest, and by corporations wholly owned by him.

Relatives of Mr. Crosby, including his wife, children and spouses of children (some of whom are officers and directors of the Company) and grandchildren, and a trust of which he is sole trustee and in which his wife and his children have a beneficial interest, owned beneficially and of record 97,850 shares or 17.09% of the Common Stock outstanding, and 195,700 shares or 13.49% of the Class A Common Stock, and his son, Mr. William M. Crosby, holds an option for the purchase of 9,000 shares of Common Stock and 18,000 shares of Class A Common Stock.

Relatives of Mr. Van Worp, Sr., including his son who is an officer and director of the Company, owned beneficially or controlled 2,522 shares or 0.44% of the Common Stock and 128,622 shares or 8.86% of the Class A Common Stock.

Directors and officers of the Company as a group (including Mr. Crosby, Mr. Miller and Mr. Robert Van Worp, Jr., but excluding the trusts above referred to and any members of their families who were not directors or officers)

owned in the aggregate 388,639 shares or 67.91% of the Common Stock and 837,290 shares or 57.73% of the Class A Common Stock.

After the sale of the 250,000 shares of Class A Common Stock being offered by the Company and the Selling Stockholders hereby, the shares of Class A Common Stock owned respectively by Mr. John F. Crosby, Mr. John C. Miller, Mr. Robert Van Worp, Sr., and the directors and officers of the Company as a group, will be as follows:

Name	Type of Ownership	Class A Common Stock	
		No. of shs.	%
John F. Crosby	Record and beneficial	310,800	20.71
John C. Miller	Record and beneficial	145,000	9.66
Robert Van Worp, Sr.	Beneficial	185,742	12.38
All directors and officers as a group	Record and beneficial	647,190	43.13

There will have been no change in the number of shares or percentages of Common Stock involved since none of said shares are being offered hereby.

Selling Stockholders

The Selling Stockholders, the number of shares of Class A Common Stock owned by each of them, the number of shares to be sold by each of them to the Underwriters, and the number of shares to be owned after the offering are as follows:

[fol. 230]			
Name	Shares Owned	Shares to be Sold	Shares to be Owned After Sale
John F. Crosby.....	490,800	180,000	310,800
John F. Crosby, Trustee for Emilie M. Crosby, et al.....	18,000	2,800	15,200
Elaine C. Murphy.....	28,800	3,800	23,000
Suzanne C. Murphy.....	19,400	3,300	16,100
John F. Crosby, Jr.....	24,400	6,800	17,600
William M. Crosby (1).....	17,900	3,300	14,600

(1) Mr. William M. Crosby also holds an option to purchase 18,000 shares of Class A Common Stock, as indicated under "Restricted Stock Options."

Mr. John F. Crosby and his sons, Mr. John F. Crosby, Jr. and Mr. William M. Crosby, are officers and/or directors of the Company. Elaine C. Murphy and Suzanne C. Murphy are daughters of Mr. John F. Crosby, and their husbands are officers and/or directors of the Company. The trust of which Mr. John F. Crosby is the trustee is an inter

vivos trust created by him for the benefit of his wife, Emilie M. Crosby, and his children.

Description of Capital Stock

The Company is authorized to issue two classes of stock, namely, Common Stock and Class A Common Stock. The Class A Common Stock is identical in all respects with the Common Stock except that it is entitled to one one-hundredth of a vote per share whereas each share of Common Stock is entitled to one Vote. Notwithstanding this limitation, the laws of Delaware provide that on certain questions, including a proposed merger, each share of stock is entitled to one vote, and that in the case of certain amendments to the Certificate of Incorporation the holders of each class of stock are entitled to vote as a class.

Each share of stock (whether Common Stock or Class A Common Stock) is entitled to share equally in dividends when and as declared by the Board of Directors out of any funds legally available therefor, and in the net assets available for distribution upon liquidation. None of the stockholders have any preemptive, conversion or redemption rights. In the opinion of Counsel for the Company the Class A Common Stock presently outstanding is fully paid and non-assessable and the 50,000 shares of Class A Common Stock being purchased by the Underwriters from the Company and offered hereby will, when issued and paid for, be fully paid and non-assessable.

Transfer Agent

The Transfer Agent for the Class A Common Stock is The First National Bank of Jersey City, 1 Exchange Place, Jersey City, New Jersey.

Legal Opinions

Legal matters in connection with the offering of the shares of Class A Common Stock offered hereby will be passed upon for the Company and the Selling Stockholders by Havens, Wandless, Stitt & Tighe, 60 East 42nd Street, New York 17, N. Y., and for the Underwriters by Sullivan & Cromwell, 48 Wall Street, New York 5, N. Y.

Experts

The financial statements and related notes included in this Prospectus, except as they relate to the years 1955 and 1956 and the six months ended July 3, 1959, and the schedules included elsewhere in the Registration Statement have been examined by Price Waterhouse & Co., independent public accountants, whose opinions thereon appear elsewhere herein or in the Registration Statement, and have been included by the Company in reliance on the opinions of such firm and on the authority of said firm as experts in auditing and accounting.

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Underwriting

The Underwriters named below, for whom Lee Higginson Corporation is Representative, have severally agreed to purchase from the Company and the Selling Stockholders the respective numbers of shares of Class A Common Stock set forth below:

Name	Address	Number of Shares	
		From the Company	From the Selling Stockholders
Lee Higginson Corporation	20 Broad Street New York 5, N.Y.	7,200	28,800
A. C. Allyn and Company, Incorporated	122 South La Salle Street Chicago 3, Ill.	3,400	13,600
Bache & Co.	36 Wall Street New York 5, N.Y.	3,400	13,600
Francis I. duPont & Co.	One Wall Street New York 5, N.Y.	3,400	13,600
Halgarten & Co.	44 Wall Street New York 5, N.Y.	3,400	13,600
Hayden, Stone & Co.	25 Broad Street New York 4, N.Y.	3,400	13,600
Shields & Company	44 Wall Street New York 5, N.Y.	3,400	13,600
Boettcher and Company	828 Seventeenth Street Denver 2, Colo.	2,200	8,800
Courts & Co.	11 Marietta Street, N.W. Atlanta 3, Ga.	2,200	8,800
Granbery, Marache & Co.	67 Wall Street New York 5, N.Y.	2,200	8,800
Im Haupt & Co.	111 Broadway New York 6, N.Y.	2,200	8,800
Arthur, Lestrangle & Co.	2 Gateway Center Pittsburgh 22, Pa.	1,500	6,000
Hirsh & Co.	25 Broad Street New York 4, N.Y.	1,500	6,000
Perce, Carrison, Wulbern, Inc.	1409 Barnett Bank Building Jacksonville 1, Fla.	1,500	6,000

Name	Address	Number of Shares	
		From the Company	From the Selling Stockholders
Saunders, Stiver & Co.	One Terminal Tower Cleveland 13, Ohio	1,500	6,000
Chaplin, McGuinness & Co.	Peoples Bank Building Pittsburgh 22, Pa.	1,200	4,800
G. C. Haas & Co.	65 Broadway New York 6, N.Y.	1,200	4,800
McKelvy & Co.	Union Trust Building Pittsburgh 19, Pa.	1,200	4,800
A. G. Edwards & Sons	409 North 8th Street St. Louis 1, Mo.	700	2,800
Funk, Hobbs & Hart, Inc.	National Bank of Commerce Building San Antonio 5, Tex.	700	2,800
J. R. Williston & Beane	2 Broadway New York 4, N.Y.	700	2,800
Harold E. Wood & Company	First National Bank Building St. Paul 1, Minn.	700	2,800
Don A. Chapin Co.	155 North College Avenue Fort Collins, Colo.	600	2,400
Powell, Kistler & Co.	110 Old Street Fayetteville, N.C.	600	2,400
Totals		<u>50,000</u>	<u>200,000</u>

[fol. 232] The Underwriting Agreement provides that the obligations of the Underwriters are subject to certain conditions precedent, but the entire 250,000 shares must be purchased if any such shares are purchased.

The Company has been advised by Lee Higginson Corporation, as Representative of the several Underwriters, that the Underwriters propose to offer the Class A Common Stock in part to the public initially at the initial public offering price set forth on the cover page of this Prospectus and in part to certain dealers, who may include Underwriters, at such price less a concession of not in excess of 40¢ per share; that such dealers may allow a discount not in excess of 12.5¢ per share on sales to other dealers; and that after the initial public offering, the Representative has authority to change the public offering price and the concession and discount to dealers.

The Selling Stockholders have agreed with the Underwriters that for a period of 90 days from the date of this Prospectus they will not, without the consent of the Representative of the several Underwriters, sell any other shares of Class A Common Stock or any shares of Common Stock of the Company.

[fol. 233] **OPINION OF THE INDEPENDENT PUBLIC
ACCOUNTANTS**

TO THE BOARD OF DIRECTORS OF MARY CARTER PAINT CO.

In our opinion, the accompanying consolidated balance sheet and related statement of retained earnings, together with the consolidated statement of earnings appearing elsewhere in this Prospectus present fairly the consolidated financial position of Mary Carter Paint Co. and its subsidiaries at July 1, 1960 and the results of their operations for the year 1959 and the six months ended July 1, 1960 and the pro forma results of operations of Mary Carter Paint Factories and subsidiaries and Southern Resin Corporation for the years 1957 and 1958, in conformity with generally accepted accounting principles consistently applied. Our examination of these statements was made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

Price Waterhouse & Co.

New York, N. Y., September 22, 1960

[fol. 234]

**MARY CARTER PAINT CO.
and Subsidiaries**

**Consolidated Balance Sheet
July 1, 1960**

Assets

Current assets:—

Cash	\$ 610,348
Receivables:	
Trade	609,978
Other	27,672
Inventories (Note 3)	845,953
Prepaid expenses	43,374
Total current assets	<u>2,137,325</u>

Property, plant and equipment, at cost

(Notes 4 and 5)	1,638,546
Less—Accumulated depreciation	585,567
	<u>1,052,979</u>

Deferred charges	35,355
Excess of investment cost over equity in net assets acquired (Note 2)	1,241,453
	<u><u>\$4,467,112</u></u>

Liabilities and Shareholders' Equity

Current liabilities:

Bank loans payable	\$ 325,000
Current portion of mortgages payable	54,141
Accounts payable	457,580
Accrued liabilities	144,044
Estimated income taxes	532,746
Total current liabilities	<u>1,513,511</u>

Mortgages payable (Note 5)	<u>239,354</u>
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Shareholders' equity (Note 7):—**Capital stock—\$1 par (Note 6) (see page 13):**

Common—Authorized 600,000 shares, issued and out- standing 572,244 shares	572,244
Class A common—Authorized 2,000,000 shares, issued and outstanding 1,450,444 shares	1,450,444
Retained earnings (per accompanying statement)	691,550
	<u>2,714,247</u>
	<u><u>\$4,467,112</u></u>

(The accompanying notes are an integral part of this statement)

[fol. 235]

**MARY CARTER PAINT CO.
and Subsidiaries**

**Consolidated Statement of Retained Earnings
For the Year 1959 and the Six Months Ended July 1, 1960**

Accumulated retained earnings of Crosby-Miller Corp. when merged into Company in January, 1959.....	\$ 492,716
Excess of par value of shares issued on the merger of Mary Carter Paint Factories over the equity of minority shareholders in capital stock and undistributed earnings (Note 1).....	(206,646)
Net earnings for year ended December 31, 1959 (see "Consolidated Statement of Earnings").....	801,748
Retained earnings at December 31, 1959.....	1,087,818
Transfer to capital stock on distribution of 1,132,000 shares of Class A Common Stock on the basis of 2 shares for each share of Common Stock outstanding.....	(897,671)
Net earnings for six month period ended July 1, 1960 (see "Consolidated Statement of Earnings").....	501,412
Retained earnings at July 1, 1960.....	<u>\$ 691,559</u>

(The accompanying notes are an integral part of this statement)

[fol. 236]

**MARY CARTER PAINT Co.
and Subsidiaries****Notes to Consolidated Financial Statements****Note 1—The Company and its Predecessors:**

Mary Carter Paint Co. was incorporated in 1958 as a wholly owned subsidiary of Crosby-Miller Corp., a company engaged for the past fifty years in a manufacturing, foundry and metal working business in Berlin, Wisconsin. All assets of Crosby-Miller Corp., other than real estate, cash and accounts receivable, were sold in 1958 and the proceeds of sale were used to acquire all of the outstanding stock of Southern Resin Corporation and 80% of the outstanding stock of Mary Carter Paint Factories, each of which was engaged in the manufacture and sale of paint products. In January, 1959, Southern Resin Corporation was merged into Crosby-Miller Corp. and the latter was then merged into the Company.

On October 31, 1960, Mary Carter Paint Factories was merged into the Company and the Company issued 6,244 shares of Common Stock and 318,444 shares of Class A Common Stock to the owners of the then outstanding 20% interest in Mary Carter Paint Factories. For accounting purposes, the issuance of these shares has been treated as a pooling of interests. Accordingly, the financial statements include all the assets, liabilities and operating results on a consolidated basis, without provision for minority interest.

The paint operations now constitute the principal business of the Company, and accordingly the "Consolidated Statement of Earnings" appearing elsewhere herein shows throughout the period the combined operations of the companies constituting the existing paint business.

Note 2—Principles of Consolidation:

The accompanying financial statements include the accounts of all subsidiaries and of the Company since the date of its incorporation in 1958.

The Company's equity in the net assets of consolidated subsidiaries at July 1, 1960 exceeded the cost of the Com-

pany's investments in such subsidiaries by \$1,060,546. In the preparation of the consolidated financial statements at July 1, 1960 this amount has been credited to the following accounts:

Retained earnings (of subsidiaries since acquisition).....	\$ 512,318
Inventories (elimination of inter-company profit).....	181,000
Excess of investment cost over equity in net assets acquired.....	367,228
	<u>\$1,060,546</u>

After the credit of \$367,228 shown above, the cost of the Company's original cash investment in the paint business exceeded the Company's equity in the book value of net assets at the date of acquisition by \$1,241,453. In the opinion of the Board of Directors, no provision for amortization of such excess of investment cost is necessary because there are no present indications of limited existence or loss of value in this excess of investment cost.

Note 3—Inventories:

Inventories have been valued at cost (determined on the basis of first-in, first-out) which is less than market and comprise \$338,553 of raw materials and supplies and \$507,400 of finished goods. The amounts of inventories used in the determination of cost of sales were as follows:

July 1, 1960.....	\$345,953
December 31, 1959.....	698,531
December 31, 1958.....	543,680
December 31, 1957.....	476,159
January 1, 1957.....	275,613

[fol. 237] Note 4—Property, Plant and Equipment and Depreciation Policy:

At July 1, 1960 the major classes of property, plant and equipment, which are stated at cost, were as follows:

Land.....	\$ 54,293
Buildings used in operations.....	544,279
Buildings rented to others.....	326,979
Autos and trucks.....	213,224
Machinery and equipment.....	215,262
Furniture and fixtures.....	178,869
Airplane.....	71,535
Construction in progress.....	34,105
	<u>\$1,638,546</u>

Depreciation is principally computed on the sum of the years digits or declining balance methods over the following estimated useful lives of the assets:

Buildings.....	10-25 years
Autos and trucks.....	2-5 years
Machinery and equipment.....	3-10 years
Furniture and fixtures.....	5-10 years
Airplane.....	5 years

Maintenance and repairs are charged against income; renewals and betterments are capitalised.

Asset and related reserve amounts are removed from the accounts upon retirement or other disposition of assets and any resulting gains or losses on dispositions are recorded in income.

Note 5—Mortgages Payable:

The long-term portion of mortgages payable at July 1, 1960 was as follows:

5½% first mortgage indebtedness, principal and interest payable in equal monthly installments of \$2,792 to July 15, 1967, secured by the Company's Berlin, Wisconsin property, and assignment of rentals under long-term lease thereon.....	\$195,475
5½% first mortgage indebtedness of subsidiary, principal and interest payable in equal monthly installments of \$1,744 to April 30, 1962 with a final installment of \$41,111 due on May 30, 1962, secured by subsidiary's property in Montgonery County, Texas.....	75,000
6% first mortgage indebtedness of subsidiary, principal and interest payable in equal monthly installments of \$287 to April 10, 1963, secured by subsidiary's property in Matawan New Jersey.....	8,292
Notes payable to National Cash Register Company under conditional sales contracts.....	14,728
	<hr/> 293,495
Less—Portion included in current liabilities.....	54,141
	<hr/> \$239,354

On July 1, 1960 the maturities on mortgages payable for the five years ending July 1 subsequent to that date were \$51,141 for 1961, \$89,136 for 1962, \$28,484 for 1963, \$27,373 for 1964 and \$28,933 for 1965.

[fol. 238] Note 6—Stock Options:

On December 3, 1958 options were granted to a company officer to purchase 750 shares of Crosby-Miller Corp. Common Stock at \$143.00 per share, which was 110% of the fair value of the stock at that date. After giving effect to the merger of Crosby-Miller Corp. into the Company in January 1959 these options entitled the optionee to purchase

37,500 shares of the Company's Common Stock at \$2.86 per share or a total of \$107,250. These options were exercised on December 30, 1959, at which time the quoted market price was \$27.25 per share or a total of \$1,021,875. The proceeds from the sale of these shares were credited to capital stock, to the extent of par value, and to capital surplus.

On November 13, 1959 options to purchase 9,000 shares of the Company's Common Stock were granted to a company officer. After giving effect to the distribution of Class A Common Stock on May 6, 1960 these options entitled the optionee to purchase 9,000 shares of Common Stock and 18,000 shares of Class A Common Stock at \$6.68 per share of each or a total of \$180,360. On the date the options were granted and became exercisable the fair market value was \$6.00 per share of each or a total of \$162,000. None of these options had been exercised at July 1, 1960.

On July 14, 1960 options were granted to a company officer to purchase 50,000 shares of the Company's Class A Common Stock at \$11.97 per share or a total of \$598,500. This amount was 110% of the market value of \$543,750 at the date of option. These options were approved by the stockholders of the Company on October 25, 1960. The options are exercisable as follows: 15,000 shares anytime to July 14, 1963, 15,000 shares anytime to July 14, 1964, and 20,000 shares anytime to July 14, 1965.

Note 7—Capital Surplus:

Capital surplus transactions were as follows:

Amounts received in excess of par value of Common Stock issued in 1959:

Sale of 16,000 shares.....	\$164,579
Exercise of 37,500 shares under option.....	69,750

Balance at December 31, 1959.....	\$234,329
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Transfer to capital stock on May 6, 1960 on distribution of 1,132,000 shares of Class A Common Stock on the basis of 2 shares for each share of Common Stock outstanding.....	<u><u>(\$234,329)</u></u>
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Note 8—Supplementary Profit and Loss Information:

	Year ended December 31,			Six months ended July 1, 1960
	1957	1958	1959	
Maintenance and repairs:				
Charged to cost of sales.....	\$ 9,463	\$ 28,530	\$ 45,019	\$ 12,829
Charged to other profit and loss accounts.....	14	910	4,002	14,708
Total.....	\$ 9,477	\$ 29,440	\$ 49,021	\$ 27,627
Depreciation:				
Charged to cost of sales.....	\$13,717	\$ 26,634	\$ 62,226	\$ 45,212
Charged to other profit and loss accounts.....	41,692	45,348	67,602	43,813
Total.....	\$55,409	\$ 71,982	\$129,828	\$ 89,025
Charged to other profit and loss accounts:				
Property taxes.....	\$ 5,266	\$ 9,700	\$ 17,926	\$ 9,760
Payroll taxes.....	14,590	23,008	35,459	26,910
Other taxes.....	6,559	7,923	15,882	10,527
Rents.....	99,913	182,922	274,575	205,986

“This prospectus furnished as a matter of information only and not as the basis of an offering of any security.”

BEFORE THE FEDERAL TRADE COMMISSION

RESPONDENTS' EXHIBIT No. 9A ID. (REJ.)

Properties Tested	Interior Latex					Identified and Rejected Date of Rejection: 8-2-61	
	III	V	VI	VII	VIII		
	Glidden Craftsman	Pittsburgh Wallhide	Super Kem-Tone	duPont 400	Mary Carter Acrylic Rol Latex	Glidden Spreed Satin	DuPont Lacite
Can Condition	3050	64-6	793			3418	2360
Ease of Application	excellent	excellent	good bubbles	excellent	excellent	fair	excellent
Flow	fair	good	poor	good	strong	sep. 3m.	best
Reflectance (Whiteness)	odor	odor	odor	odor	odor	good odor	odor
Color Retention (Yellowing)	Great ease	Great ease	Great ease	Great ease	Great ease	Great ease	Great ease
Flexibility	good	poor	poor	poor	good	fair	poor
(1/4" mandrel & ribboning test)	83	85	84	84	89	87	86
Opacity (contrast ratio)	good	good	(fair	fair	best	fair	good
Weight per gallon	excellent	excellent	excellent	excellent	excellent	excellent	excellent
Grind (Dispersion)	97.6	96.6	97.7	97.7	97.9	98.7	97.7
	11.5	11.2	11.6	10.6	11.8	11.6	10.9
	very good	very good	very good	very good	very good	very good	very good
	best	best	best	best	best		
Viscosity (K.V)	86	80	71	66	82	73	94
Gloss (Sheen)	high	low	high	very low	low	high	very low
Drying Time	normal good	normal good	normal good	normal	normal good	normal good	normal good
	dry	dry	dry	good dry	dry	dry	dry
	2nd	3rd	3rd	3rd	best	4th	3rd

[fol. 241]

BEFORE THE FEDERAL TRADE COMMISSION

RESPONDENTS' EXHIBIT No. 9B ID. (REJ.)

Properties Tested	Exterior Latex				Date of Rejection: 8-2-61
	I Mary Carter Rol case	II Sherwin- Williams A-100	IV duPont Lucite Acrylic 50	IX Glidden Spred 3600	
Can Condition	excellent good odor	excellent good odor	excellent best odor	fair sep. 2m good odor	
Ease of Application	excellent	fair	excellent	excellent	
Flow	fair	fair	poor	fair	
Reflectance (Whiteness)	84	85	83	85	
Color Retention (Yellowing)	poor	best	fair	good	
Flexibility ($\frac{3}{4}$ " mandrel & ribboning test)	excellent	excellent	excellent	excellent	
Opacity (contrast ratio)	97.7	96.6	96.6	96.6	
Weight per gallon	11.1	11.3	11.3	11.2	
Grind (dispersion)	very good (best)	very good	very good	very good	
Viscosity (KV)	82	87	85	70	
Gloss (Sheen)	good	high	high	high	
Drying Time	normal dry	normal dry	normal dry	normal dry	
Hardness	good best & best adhesion	good	good	good	
pH	7.0	7.0	7.0	7.7	
Scrub Cycles	All Excellent Over 5000				
Freeze-Thaw	(1) Slight soften OK	No soften OK	slight soften OK	softens most OK	
	(2) Viscosity Increase	Viscosity Increase	OK	Viscosity Increase	
Cycles	(3) 95 KV	105 KV	OK	85 KV	
	final tests	good	good	poor	
Chemical Resistance	normal	normal	normal	normal	
Cold Water Tests	excellent	very good	excellent	excellent	
Boiling Water Tests	good	very good	very good	best	
Color Uniformity	fair	very poor	very poor	very good	
Sheen Uniformity		poor	fair	good	

[fol. 245] BEFORE THE FEDERAL TRADE COMMISSION

RESPONDENTS' EXHIBIT No. 19A ID. (REJ.)

149 4/4/61
Rejected 8-2-61

By Erroll Duren, Gorden Kalbfleisch, Robert Fern,
Gerald White.

Report on Competitive Paint Tests

Samples of paint were purchased from dealers for the following paint manufacturing companies: Sears Roebuck, Sherwin-Williams, and DuPont. These paints were obtained in the top grade in all cases, and the following lines were samples:

1. Outside Oil House Paint White
2. " " " " " Color
3. Outside Latex House Paint White
4. " " " " " Color
5. Exterior Masonry Paint White
6. " " " " " Color
7. Trim and/or Deck Enamel Gray
8. " " " " " Blue
9. " " " " " Green
10. Interior Semi-Gloss Enamel White
11. High Gloss Architectural Enamel White
12. Interior Latex Wall Paint White
13. " " " " " Color
14. Special Primer for New Wood

These paints were compared with the corresponding Mary Carter product in the following tests:

1. Caustic resistance—reported in time required for a drop (.05 ml) of 3% NaOH solution to spread from the center of a 1/4" square until touching any three sides.
2. Pencil Hardness
3. Scrubbability—latex base paints only

4. Flow—rated from 0 for no flow to 10 for excellent flow.
5. Viscosity
6. Can Condition
7. Weight per gallon
8. pH (latex paints only)
9. Drying time tack free
10. Hiding power (contrast ratio)
11. Grind
12. Gloss (85° for flats & semi-gloss, 60° for full gloss paints).
13. Sand abrasion for enamels and house paint—reported in liters of sand required for break.
14. Unit cost
15. Weatherometer exposure—up to 1000 hours or failure, whichever occurs first (rated 4-1, best to worst).

BEFORE THE FEDERAL TRADE COMMISSION

RESPONDENTS' EXHIBIT No. 19C ID. (REJ.)

Brand	Can condition	Scrub Cycles	Cautic Resin.	Pencil Hardness	Sand Abrasion	Flow	Viscosity	W.P.G.	pH	Drying Time	Hiding Power	Grind	Gloss	Weatherometer	Identified and Rejected Date of Rejection: 8-2-61
Trim and/or Deck Enamel Gray															
A	ok	—	—	3	30	10	70	10.05	—	8 hr	1.00	6	88	1	1
B	ok	—	—	3	18	9	61	7.96	—	8 hr	1.00	6½	90	3	3
C	settled	—	—	3	24	10	74	8.35	—	6 hr	1.00	7½	90	4	2
D	ok	—	—	3	40	9	75	9.15	—	8 hr	1.00	6	95	2	2
Trim and/or Deck Enamel Blue															
A	ok	—	—	2½	34	10	57	8.70	—	8 hr	1.00	6	92	2	2
B	ok	—	—	1	18	7	68	8.45	—	8 hr	1.00	7	88	3	3
C	None Available	—	—	3	40	9	75	8.65	—	8 hr	1.00	6	90	4	4
D	ok	—	—	3	40	9	75	8.65	—	8 hr	1.00	6	90	4	4
Trim and/or Deck Enamel Green															
A	ok	—	—	3	34	10	68	9.15	—	8 hr	1.00	6½	92	1	1
B	ok	—	—	2½	16	9	71	8.40	—	8 hr	1.00	6½	90	3	3
C	ok	—	—	2½	28	10	61	13.78	—	8 hr	1.00	6½	88	2	2
D	ok	—	—	3	36	10	78	9.15	—	8 hr	1.00	6	90	4	4

Brand	Can condition	Scrub Cycles	Caustic Resist.	Pencil Hardness	Sand Abrasion	Flow	Viscosity	W.P.G.	pH	Drying Time	Hiding Power	Grind	Gloss	Weatherometer
Interior Semi-Gloss White														
A	ok	—	—	3	—	6	82	8.65	—	6 hr	.99	7	75	4
B	ok	—	—	3	—	7	84	11.46	—	4 hr	.98	5 1/2	70	2
C	ok	—	—	3	—	4	92	10.35	—	5 hr	.98	6	43	1
D	ok	—	—	3	—	3	86	11.41	—	3 hr	.98	6	56	3
Architectural Enamel White														
A	ok	—	—	3	34	10	72	9.25	—	5 hr	.97	7	88	3
B	ok	—	—	3	12	7	81	9.49	—	4 hr	1.00	7	90	3
C	ok	—	—	4	24	7	72	8.05	—	6 hr	.99	8	96	1
D	ok	—	—	4	30	8	82	9.90	—	5 hr	.98	6	94	4
Interior Latex Wall Paint White														
A	ok	39	10	3	—	4	79	11.74	9.3	30 m	.98	—	4	1
B	lumps	500	25	3	—	4	70	11.00	9.0	30 m	.98	—	6	3
C	ok	41	31	1	—	3	82	10.70	9.3	30 m	.99	—	6	2
D	ok	500	9	2	—	5	83	11.65	9.3	30 m	.97	—	6	4

RESPONDENTS' EXHIBIT No. 19D ID. (REJ.)

Brand	Can condition	Scrub Cycles	Caustic Resis.	Pencil Hardness	Sand Abrasion	Flow	Viscosity	W.P.G.	pH	Drying Time	Hiding Power	Grind	Gloss	Weatherometer	Identified and Rejected Date of Rejection: 8-2-61
Interior Latex Wall Paint Color															
A	ok	6	6	2½	—	6	81	11.61	8.9	30 m	1.00	—	5	3	
B	lumps	500	26	3	—	3	80	11.01	9.0	30 m	1.00	—	5	4	
C	ok	16	6	2	—	3	75	10.90	9.1	30 m	1.00	—	1	2	
D	ok	500	7	2	—	4	73	11.44	9.2	30 m	1.00	—	1	1	
Special Primer for New Wood															
A	None Available					3	70	12.47	—	20 hr	.99	3½	38	1	
B	ok			0		6	68	9.90	—	20 hr	.97	5½	25	3	
C	ok			2		5	74	13.21	9.5	1 hr	.97	4	10	2	
D	ok														

[fol. 249] BEFORE THE FEDERAL TRADE COMMISSION

RESPONDENTS' EXHIBIT NO. 19E ID. (REJ.)

Identified and Rejected
Date of Rejection: 8-2-61

In trying to evaluate these results impartially, an arbitrary value* was assigned to each test and all results tabulated from these values. These values are so placed that if one manufacturer's paints were the best in every test for every paint tested, that company would receive a total of 1020 points. If a company was worst in all tests on all paints it would receive a total of 204 points.

A — 543

B — 649

C — 549

D — 735

In addition to these tests, an exposure was made on the Mary Carter test fences in Tampa and Conroe on all exterior rated paints. These tests may be followed in the Exposure Book (EX 176-204).

	Best			Worst
*Can Condition.....	6	4	3	2
Scrub Cycles.....	6	4	3	2
Caustic Resistance....	5	3	2	1
Pencil Hardness.....	4	3	2	1
Sand Abrasion.....	6	4	2	1
Flow.....	7	5	3	1
Viscosity.....	4	3	2	1
Weight per gallon....	4	3	2	1
Drying Time.....	6	3	2	1
Hiding Power.....	8	6	4	2
Grind.....	4	3	2	1
Gloss.....	4	3	2	1
Cost.....	8	6	4	2
Weatherometer.....	10	8	6	4

[fol. 250] BEFORE THE FEDERAL TRADE COMMISSION

RESPONDENTS' EXHIBIT NO. 19F ID. (REJ.)

Rejected 8-2-61

Code

- A Sherwin-Williams
- B Sears Roebuck
- C DuPont
- D Mary Carter

BEFORE THE FEDERAL TRADE COMMISSION

RESPONDENTS' EXHIBIT No. 23

it "sparkles"

The advertisement features two large paint cans, one labeled 'WHITE' and the other 'MILK CHOCOLATE'. Both cans have the 'MARY CARTER' logo and a 'REGISTERED' stamp. A house is depicted in the background with the text 'Mary Carter's House Paint' written across it. The cans are shown with a 'sparkle' effect, suggesting the paint's quality.

IN THE MATTER OF Mary Carter
 DATE 12/10/61 WITNESS Address
 ACE REPORTING CO., Official Reporter
 \$10.00

BUCKET NO. 119 CONSUMER COMPLAINT NO. 23
 FEDERAL TRADE COMMISSION
 TRADE EXHIBIT NO. 23

Mary Carter's House Paint spreads so evenly it seems to glide on, yet has high covering power and rugged durability. Sparkling white or your choice of more than 1,500 decorator shades with the all-new Mary Carter Precision tinting system.

Visit your Mary Carter Paint Store for outstanding value, too, thanks to the can of paint you get FREE of extra cost with every one you buy at regular competitive prices.

Buy one
 get one
 FREE OF EXTRA COST

MARY CARTER PAINT CO.
MORE THAN 700 STORES COAST TO COAST.
 PLANTS IN TAMPA, FLA.; MATAWAN, N. J.; CONROE, TEX.; CHINO, CAL.
 Limited franchise available - for details write Mary Carter Paint Co., Green Hills, Tampa, Florida.



BEWARE THE MAKERS OF INFERIOR 2-FOR-1 PAINT!

DOCKET NO. 8290
IN THE MATTER OF Mary Carler
DATE 5/3/61
WITNESS
ACF RESEARCH CO., ORIGINATOR
SALES INDUCEMENTS

Enthusiastically support the National Paint, Varnish and Lacquer Association's crusade, in your behalf, against unscrupulous manufacturers of inferior paint who offer so-called 'Second Can Free' or 'Second Can For a Penny More' sales inducements.

By
"Initiation is said to be the most sincere form of flattery. If that's so, I should be the most flattered paint manufacturer in the industry! Unfortunately, my would-be initiators never go far enough in their attempts to copy the Mary Carter success story — and it's what they FAIL TO DO that makes the big difference!

"As the originator, many years ago, of 'Every 2nd Can Free of Cost,' I'm not at all flattered by initiators who:

"Boldly double the price of cheap paint ...

"Refuse to stand behind their products ...

"Are guilty of shoddy manufacturing, advertising and sales practices ...

"My facilities for serving you have grown from one small store in Tampa, Florida, to 400 retail outlets in 23 states, an ultra-modern research laboratory and three big paint factories. That's because I've always been willing to sell top quality Mary Carter paint at a profit of pennies per gallon, and because of operational economies which I traditionally share with you in the form of free extra paint."

HOW IS THE FREE GALLON POSSIBLE?

"Because of my unique operational economies, I can manufacture top quality paints, varnishes and enamels at less cost, in addition, I'm enabled with a profit of pennies per gallon. Thousands of additional profits with company and underwritten retail sales ... million paint factories ... manufacturing unscrupulous methods ... My new line of enamel leads to our store of obtaining one additional and of shipping paint ... All of these other savings which I pass on to you with every can of paint absolutely free of extra cost!"

ALLOY FLAT WALL PAINT



Quality and availability in a variety of colors. Can be used for interior and exterior wall painting.

12.00 qt. \$5.99 gal.
Mary Carler Paint



CHINA LUXE

A new richness, availability and color. Can be used for interior and exterior wall painting.

12.25 qt. \$6.99 gal.
Mary Carler Paint



ACRYLIC SOL-LATER

For interior wall painting. No need for primer. Can be used for interior and exterior wall painting.

12.25 qt. \$6.99 gal.
Mary Carler Paint



MARY CARTER OUTSIDE OR

Excellent for exterior wall painting. Can be used for interior and exterior wall painting.

12.25 qt. \$6.99 gal.
Mary Carler Paint

EVERY 2ND CAN FREE

WORLD'S
LARGEST OPERATION
OF ITS KIND

2 MARY CARTER PAINT FACTORIES

TAMPA 2710 S. Bay St. 2710 S. Bay St. 2710 S. Bay St. 2710 S. Bay St. 2710 S. Bay St.	DAVENPORT 1105 E. Main St. 1105 E. Main St. 1105 E. Main St. 1105 E. Main St. 1105 E. Main St.	MOBILE 1000 1/2 Ave. N. 1000 1/2 Ave. N. 1000 1/2 Ave. N. 1000 1/2 Ave. N. 1000 1/2 Ave. N.	MEMPHIS 1000 1/2 Ave. N. 1000 1/2 Ave. N. 1000 1/2 Ave. N. 1000 1/2 Ave. N. 1000 1/2 Ave. N.	MEMPHIS 1000 1/2 Ave. N. 1000 1/2 Ave. N. 1000 1/2 Ave. N. 1000 1/2 Ave. N. 1000 1/2 Ave. N.	MEMPHIS 1000 1/2 Ave. N. 1000 1/2 Ave. N. 1000 1/2 Ave. N. 1000 1/2 Ave. N. 1000 1/2 Ave. N.	MEMPHIS 1000 1/2 Ave. N. 1000 1/2 Ave. N. 1000 1/2 Ave. N. 1000 1/2 Ave. N. 1000 1/2 Ave. N.	MEMPHIS 1000 1/2 Ave. N. 1000 1/2 Ave. N. 1000 1/2 Ave. N. 1000 1/2 Ave. N. 1000 1/2 Ave. N.	MEMPHIS 1000 1/2 Ave. N. 1000 1/2 Ave. N. 1000 1/2 Ave. N. 1000 1/2 Ave. N. 1000 1/2 Ave. N.	MEMPHIS 1000 1/2 Ave. N. 1000 1/2 Ave. N. 1000 1/2 Ave. N. 1000 1/2 Ave. N. 1000 1/2 Ave. N.
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BEFORE THE FEDERAL TRADE COMMISSION

Mary Carter says:

COMMISSION'S EXHIBIT No. 3



“TO PAY LESS
IS DANGEROUS;
TO PAY MORE
IS FOOLISH!”

"GO SHOPPING FOR PAINT, and you'll find all kinds of 'bargain basement' deals in discontinued colors, factory reject lots and labels no one's ever heard of, for less money than the cost of Mary Carter paints. You will also, without having to look very far, find other paints costing a dollar to four dollars a gallon more than my most expensive product.

"DON'T TAKE A CHANCE ON EITHER EXTREME!"

"Every point manufacturer knows the worth of his product. If he prices his point at a ridiculously low level, it reflects his own opinion of what's in the can—and no one should know better than he whether the point he makes is really as cheap as the price tag. It's DANGEROUS to risk your money on such 'bargains.' On the other hand,

"THERE ARE ONLY SO MANY INGREDIENTS in even the best grade of paint, and everything you pay beyond their cost can only be chalked up to the manufacturer's operating overhead. The maker of high priced paint is asking you to help support his archaic manufacturing methods, his outmoded distribution set-up and his antiquated merchandising system. It's FOOLISH to spend your money for his mistakes!

"PAY MORE FOR MARY CARTER PAINT than you'd spend on a 'bargain basement' deal . . . PAY LESS FOR MARY CARTER PAINT than you would for expensive paints, and you'll be spending your money wisely and well. My unique, streamlined manufacturing and merchandising techniques, modern production equipment, my own fleet of Diesel semi-trailers, direct shipments from Mary Carter Paint Factories to Mary Carter retail outlets — all mean you spend less of your paint dollar for overhead . . . more of your paint dollar for paint in addition, you get

Every 2nd Can

**HOW IS THE
FREE GALLON POSSIBLE?**

[illegible]

OF EXTRA COST.

**WHY NOT JUST
CHARGE HALF PRICE?**

"My points are quality priced because they are quality priced! It would be easy to cut the price per gallon to half, instead of giving a full cut with every one I sell, but I refuse to 'lead out' my points by giving them an unrealistic, low price tag. I never classify my Carbor points with any of the cheap materials being offered, nor will I ever discount my products by responding to price reductions, discounts or special sales. I manufacture the same high quality paint for all my customers, at the same low price for everyone.

FREE CUSTOM TINTING!

Factory-aided Mary Carter paid operators all he pleased to estimate how many there you may require to harmonize with the policy scheme of your house. There's no charge for this prearranged meeting service, and you can be sure of professional results every time!

AS ADVERTISED
IN THE SATURDAY
EVENING POST



MARY CARTER
OUTSIDE WHITE

**ALKYD FLAT
WALL PAINT**

CHINA
LUXE

55715
cinon

TRIM AND DICK
[NAME]

2.75 ea. 6.98 ea.

25 qt. \$6.98 gal.
Many Good Good Deals

[illegible]

1 qt. '6.98 gal. '12.00

[illegible]

2.25
 6.98
 10.23

ONLINE SUBMIT

2000 10
2000 10
2000 10
2000 10
2000 10
2000 10
2000 10

[illegible]

GULFPORT
6728 Leche Ave
GALVESTON
2611 Jones St
FARMINGTON
101 E. 1st St
WAUCHULA

BANG CITY
 111 N. 1st St.
 CLEVELAND
 W. 9 May 61
 HAYESVILLE
 March 59
 LAKELAND
 111 Center Drive

1400 WALKER
107 E. Park Ave.
1400
511 Chambers
Large 2d
6100 Semple Rd (Ave 10)
1400

NEW POST RICHMOND
Route 1, Box 99
MADISON BEACH
11713 Ocean Blvd
VERMONT WAREHOUSE
FOR CASH TO A WHOLE
2025

225-113

[FOL-254]-

BEFORE THE FEDERAL TRADE COMMISSION

mary carter o'ays:

COMMISSION'S EXHIBIT No. 5

“Buy only half
the PAINT
YOU NEED!”

"How many gallons of paint do you figure it will take to cover the outside of your home? Eight? Twelve? Twenty? Whatever the amount, it represents a big investment in dollars. You may be postponing some badly needed redecorating because of the cost.

"There's no need to put it off any longer! When you use Mary-Carter paints,

"YOU BUY ONLY HALF AS MUCH!"

"That's right—buy half as much paint as the job requires and I'll GIVE you the rest, absolutely FREE of extra cost! That's the unique Mary Carter merchandising method that has positively rocked the paint industry! That's my famous 'Share the profits' plan, and it can be your good fortune if there's painting of any kind to be done around your home right now!

"There are two good reasons why I can afford to give away every second can of the very best grade of paint, free of extra cost! Because of my operational economies, I can manufacture top quality paints, enamels and varnishes at less cost, and, in addition, I'M SATISFIED WITH A

PROFIT OF PENNIES PER GALLON!

★ MANUFACTURE
Many Cater's high-speed jobs involve
finishing equipment built into the


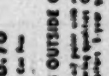

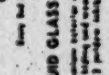


★ **MULTIPLE TRANSPORTATION**
Many Carter's stores of different franchises
offer different vehicle transportation.


★ WAREHOUSE
DISTRICT
Mary Carter
has been forced

4. MULTIPLE COMMISSIONS

WINDRIZAS TRADING CORPORATION

10/1/11
P. 10/1/11

	<p>CHINA LUXE</p> <p>For the bath or toilet, the three of us are satisfied to wash, shampoo and perfume ourselves.</p> <p>\$2.25 Qt. \$6.98 Gal.</p> <p>Strong Red Oak Case</p>	
	<p>LIQUID GLASS</p> <p>Never glassy when the Ridding with "Liquid Glass" Wash. Recommended for floors.</p> <p>\$2.00 Qt. \$6.98 Gal.</p> <p>Strong Red Oak Case</p>	
	<p>LIQUID GLASS OUTSIDE OIL</p> <p>A problem solver of paint and wood. It makes the paint and wood last and wearing qualities. Can save 1/2 price substitutes 1 year later.</p> <p>\$2.00 Qt. \$6.98 Gal.</p> <p>Strong Red Oak Case</p>	




TRIM & DECK ENAMEL

For painting trim and deck
boards, 1 to 10 gallons. Colors
white, black, red, green, blue,
yellow, and other colors.

Price
\$1.20 per gal.
\$6.98 per
gallon

Buy 1 and Get 1 Free




MARY CARTER

OUTDOOR WHITE

For painting siding and trim. Can
be used on brick, concrete, and
other exterior surfaces.

Price
\$1.20 per gal.
\$6.98 per
gallon

Buy 1 and Get 1 Free



SPAR VARNISH

For painting exterior woodwork for
durability, waterproofing, and
protection. Can be used on
siding, trim, and other exterior
surfaces.

Price
\$1.20 per gal.
\$6.98 per
gallon

Buy 1 and Get 1 Free

EVERY 2ND CAN FREE

MARY CARTER PAINT FACTORIES

[illegible]

52



[fol. 257] BEFORE THE FEDERAL TRADE COMMISSION
COMMISSION'S EXHIBIT No. 9

MARY CARTER PAINTS

(60-Second TV Commercial—General)

Video

Audio

Booth Anner:

Card # 1

Now, take advantage of Mary Carter's famous free paint offer! Pick out any two cans of top quality paint and pay for only one at the Mary Carter Paint Factories branch at _____.

Flip Card # 2

That's right: buy a quart, a gallon or more of Mary Carter paint and get an equal amount, absolutely free of extra cost. The world's largest operation of its kind has already given away more

Flip Card # 3

than five million gallons of free paint, from New England to Texas. There's a famous formula Mary Carter paint for every purpose so, whether you're thinking about painting a room or the entire house, you'll find the best paint for the job at the _____ Mary

Flip Card # 4

Carter paint store. Ask to see the premium Liquid Glass products, containing three mildew inhibitors and guaranteed for five years. For walls, ceilings and outside masonry, Mary Carter's lighter, brighter Acrylic Rol-latex paint is easy to brush or roll on, has no painty odor and it dries in 20 minutes. And, don't forget, every second can is free of extra cost at the Mary Carter paint store,

Flip Card # 5

FREE PAINT

NO PURCHASE NECESSARY

(INSERT DATE HERE)

A '2 CAN OF LIQUID GLASS

ENAMEL

WHY



WHERE

(YOUR ADDRESS HERE)

We believe the quality of every can of MARY CARTER PAINT you buy is equal to or better than any paint sold at our single can price... and every second can is free of extra cost! Satisfaction guaranteed or all your money back.

MARY CARTER PAINT
GUARANTEE OF QUALITY

Mary Carter



MARY CARTER PAINT FACTORIES

We want you to try MARY CARTER paint, and we want you to visit our store to see the complete line of quality paints, varnishes and enamels available with our famous offer... Buy One — Get One Free of extra cost.

So we offer you a \$2.00 can of Liquid Glass Enamel absolutely free... ENOUGH TO PAINT A KITCHEN APPLIANCE, DINING ROOM CHAIR OR CARD TABLE.

[fol. 262] BEFORE THE FEDERAL TRADE COMMISSION

COMMISSION'S EXHIBIT No. 35

THE TERRE HAUTE STAR, THURSDAY, SEPTEMBER 8, 1960

7

**EVERY 2nd CAN
FREE**



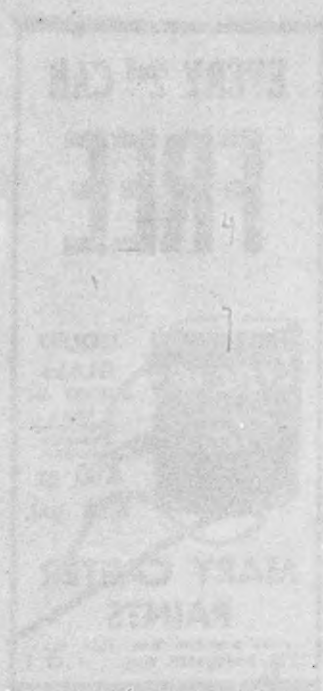
**LIQUID
GLASS**
OUTSIDE OIL
Keep
Application
Superior
Sealing

2.00 qt.
3.98 gal.

**MARY CARTER
PAINTS**

Open 8:30-5:00 Mon. thru Sat.
1221 Lafayette Ave. C-4721

THE UNIVERSITY OF CHICAGO
LIBRARY
CHICAGO, ILL.



HUBERT HENDRIX, Assoc. Editor
GLEN O. LONG, Managing Editor


JOE E. HART, Circulation Manager
C. E. WEBBER, Business Manager
FRED D. MOFFITT, Assoc. Publisher

SPARTANBURG, S. C.

SUNDAY, AUG. 28, 1960


TRA QUALITY! XTRA SAVINGS!

THE SOUTH'S MOST FAMOUS PAINT



\$5.98 Every 2nd Can **FREE!**

LIQUID PLASTER PAINT



\$6.98 Every 2nd Can **FREE!**

GUARANTEED! BEST YOU HAVE EVER USED!
MARY CARTER PAINT FACTORIES

MARY CARTER PAINT FACTORIES
WORLD'S LARGEST OPERATION OF ITS KIND
Outlet No. 221 — 225 St. John St.
Jones P. Burgess, Mgr.

EVERY 2nd CAN FREE

Contains mildew-ides (superior to any so it is perfect. Its non yellow qualities attribute to the 3 year guarantee

8.98 gal.

WORLD'S LARGEST OPERATION OF ITS KIND
Went To Grayhound Bus Station
Phone 585-4157

GLADLY RECOMMEND A RELIABLE PAINTER

FEDERAL TRADE COMMISSION

why give a FREE can of PAINT?

on
of 1
Paints
Report



**Why Not Just Charge
HALF PRICE?**

"I've often been asked: 'Why a free can of paint? Why not just cut the price of your paint in half?' The best answer I can give is this:

**"MY PAINTS ARE QUALITY PRICED
BECAUSE THEY ARE QUALITY PAINTS!**

"Take my Acrylic Rol-latex paint as an example. It's worth every penny of the price at \$6.98 a gallon, as demonstrated by all laboratory tests and by its widespread popularity over a period of years. It would be easy to cut the price in half for a single gallon, instead of giving a second can free with every one I sell, but

**"I REFUSE TO 'SECOND RATE' RATE MY PAINTS
By GIVING THEM A LOW PRICE TAG I**

"Have you ever seen what improper pricing can do to a good product? I will not classify my paints with any of the cheap imitations that are being offered, nor downgrade them by resorting to price reductions, discounts or special sales, even though

**"MY UNIQUE OPERATIONAL ECONOMIES
MAKE MY FREE PAINT OFFER POSSIBLE!**

"I save money with my particular way of doing business . . . Company and dealer-owned retail stores . . . Ultra-modern paint factories . . . Streamlined merchandising methods . . . My own fleet of Diesel trucks to cut costs of obtaining raw materials and of shipping paint . . . A willingness to settle for a profit of pennies per gallon . . .

laboratory tests and by its widespread popularity over a period of years. It would be easy to cut the price in half for a single gallon, instead of giving a second can free with every one I sell, but

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"Have you ever seen what improper pricing can do to a good product? I will not classify my paints with any of the cheap imitations that are being offered, nor downgrade them by resorting to price reductions, discounts or special sales, even though

"MY UNIQUE OPERATIONAL ECONOMIES MAKE MY FREE PAINT OFFER POSSIBLE!"

"I save money with my particular way of doing business . . . Company and dealer-owned retail stores . . . Ultra-modern paint factories . . . Streamlined merchandising methods. My own fleet of Diesel trucks to cut costs of obtaining raw materials and of shipping paint . . . A willingness to settle for a profit of pennies per gallon . . . All of these factors make it possible for me to offer you a product which I pass on to you with

EVERY 2nd CAN

OF TOP QUALITY PAINT

Absolutely FREE of Extra Cost!"



**ACRYLIC
ROLL-LATEX**

For interior walls, ceilings, exterior masonry. No painty odor, washable, dries in 20 minutes.

\$2.25 qt. \$6.98 gal.
Every 2nd Can Free



CHINA LUXE

For the look of velvet, the sheen of satin. Medium gloss enamel in a variety of captivating shades.

\$2.25 qt. \$6.98 gal.
Every 2nd Can Free



OUTSIDE PAINT

Finest Mary Carter outside while you can find anywhere! Wonderful hiding quality, a beautiful finish, mildew resistant.

\$2.25 qt. — \$6.98 gal.
Every 2nd Can Free

MARY CARTER PAINTS

FACTORY BRANCHES
5000 ASHER AVE.
LITTLE ROCK
LO 5-5724

18th & PIKE AVE.
N. LITTLE ROCK
FR 2-7083

COMMISSION'S EXHIBIT No. 43

THE LOUISVILLE TIMES, SATURDAY, AUGUST 27, 1960



**MARY
CARTER
SAYS:**

FREE CUSTOM TINTING

Factory-trained paint specialists will custom-tint any shade you may require to harmonize with the color scheme of your home. There's no charge for this personalized service, and you can be sure of professional results every time!

**ACRYLIC
ROL-LATEX**

Interior-exterior use. 20-minute drying. Easy water clean-up.

\$2.25 qt. \$6.98 gal.

Every 2nd Can Free

**TEXTURON**

Beautifully textured. Exceptionally adhesive. Adds charm to walls.

\$2.25 qt. \$6.98 gal.

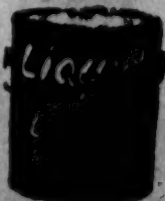
Every 2nd Can Free

**CHINA
LUXE**

Setiny medium gloss. Many beautiful shades. Rapid drying.

\$2.25 qt. \$6.98 gal.

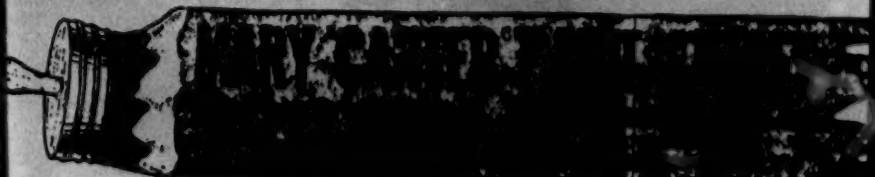
Every 2nd Can Free

**LIQUID GLASS
OUTSIDE OIL**

Super glossy finishes. Mildew resistant. Five-year guarantee.

\$3.00 qt. \$8.98 gal.

Every 2nd Can Free

**FEDERAL TRADE COMMISSION**

Booklet No. 92 Supplemental Exhibit No. 43

-5-3-6- R.

N.Y.

IT'S ECONOMICAL (and smart, too!) to decorate with MARY CARTER PAINTS

Any time you can get enough paint to do the entire job, yet pay for only half as much as you need, you're really practicing economy! That's why it's smart to shop at Mary Carter stores, where you get

EVERY 2nd CAN FREE of extra cost!

**ACRYLIC
ROL LATEX**

The fast, easy, water-soluble latex paint for interior and exterior surfaces. No primer, no sanding, no peeling, no cracking, no fading, no staining, no odor, no mess, no clean-up.

\$2.25 qt. \$6.98 gal.

EVERY 2nd CAN FREE of extra cost!

**MARY CARTER
OUTSIDE WHITE**

Contains three mils of white paint. Fast-drying and hard for use on wood, metal, or masonry.

\$2.25 qt. \$6.98 gal.

Every 2nd Can Free



**LIQUID GLASS
ENAMEL**

Keeps up to 90% high-gloss for years. No sanding, no peeling, no cracking, no fading, no staining, no odor, no mess, no clean-up.

\$3.00 qt. \$8.98 gal.

Every 2nd Can Free

**LATEX
ENAMEL**

For any cement painting. Fast-drying, easy to apply.

\$3.00 qt. \$8.98 gal.

Every 2nd Can Free



**CHINA
LUXE**

For any wall or ceiling. Rapid-drying, easy to apply. Many beautiful shades.

\$2.25 qt. \$6.98 gal.

Every 2nd Can Free

TRIM & DECK ENAMEL

10 glossing colors. Every 2nd Can Free

Tough water-resistant durability in

12.5 or 16.98 gal.

REDWOOD STAIN

See used. Every 2nd Can Free

14.98 gal.



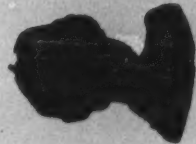
MARY CARTER PAINT FACTORIES

World's Largest Operation of its kind

St. Petersburg

Clearwater

Large



Mary Carter says:

"When It Comes To Paint, YOUR MONEY'S WORTH ISN'T ENOUGH!"

"THE CHANCES ARE YOU'LL GET FULL VALUE when you buy paint from any reputable manufacturer. The product will do everything claimed for it; it'll be pleasing to the eye and, quite likely, it won't flake, peel or chip! You will, in short, be getting what you pay for.

"MARY CARTER PAINT CUSTOMERS get the same full value, plus my unique 'no-cost extras' that actually give you more than your money's worth! When you buy Mary Carter paint, enamel or varnish, you're not paying for high profits — I'm satisfied with pennies per gallon! You're not paying for the services of wholesalers, jobbers or other middlemen, either — I ship my paint from my own factories, in my own big Diesel semi-trailers to my own retail paint stores.

"IN ADDITION, EVERY 2nd CAN IS FREE OF EXTRA COST! That's another big 'more for your money' dividend for users of Mary Carter paint. No matter how much or how little you buy, I'll give you an equal amount of paint, absolutely free of extra cost. There's no limit to this offer, and it applies to all the paint, varnish and enamel at any of my 400 retail branches.

"MORE THAN YOUR MONEY'S WORTH is the policy that has made Mary Carter Paint Factories the world's largest operation of its kind. It means, whether you're painting a single room or the entire house,

YOU BUY ONLY HALF THE PAINT YOU NEED! Every 2nd Can The rest is free of extra cost. That's Mary Carter's way, and once you've tried it you'll never buy any other paint! Next time you have decorating

FREE

"MORE THAN YOUR MONEY'S WORTH is the policy that has made Mary Carter Paint Factories the world's largest operation of its kind. It means, whether you're painting a single room or the entire house,

"YOU BUY ONLY HALF THE PAINT YOU NEED! Every 2nd Can The rest is free of extra cost. That's Mary Carter's way, and once you've tried it you'll never buy any other paint! Next time you have decorating to do, why not get more than your money's worth? Buy your paint the Mary Carter way — the way that gives you

FREE

Of Extra Cost."

HOW IS THE FREE GALLON POSSIBLE?

"Because of my unique operational economies, I can manufacture high quality paints, enamels and varnishes at less cost than any other paint. In addition, I'm satisfied with a profit of pennies per gallon! Elimination of middlemen's profits with company and dealer-owned retail stores . . . modern paint factories . . . streamlined merchandising methods . . . my own fleet of Diesel trucks to cut costs of obtaining raw materials and of shipping paint . . . All of these effect savings, which I pass on to you with every 2nd can of paint absolutely free of extra cost!"

WHY NOT JUST CHARGE HALF PRICE?

"My paints are quality priced because they are quality paint! It would be easy to cut the price per gallon in half, instead of giving a 2nd can free with every one I sell, but I refuse to 'second rate' my paints by giving them an unrealistic, low price tag. I'll never classify Mary Carter paints with any of the cheap imitations being offered, nor will I ever downgrade my products by resorting to price reductions, discounts or special sales. I manufacture the same high quality paint for all my customers, at the same fair price for everyone."



ACRYLIC ROL-LATEX

Washable, lighter and brighter shades for interior or exterior use. No 'painty' odor; dries in 20 minutes!



\$2.25 qt. \$6.98 gal.

Every 2nd Can Free

CHINA LUXE.....\$2.25 qt. — \$6.98 gal.

MARY CARTER OUTSIDE OIL.....\$2.25 qt. — \$6.98 gal.



MARY CARTER PAINT FACTORIES

MARY CARTER PAINT STORE

LOOK FOR THE BRIGHT YELLOW STORE

233 West Street

Phone CO. 3-2341

FREE PARKING BEHIND BUILDING

216

EVERY 2nd CAN

FREE

OF EXTRA COST

at any

major paint

factories

branch

TRIM & DECK
ENAMEL
INTERIOR-EXTERIOR
EASY BRUSHING
EXCEPTIONAL
HOLDING
\$2.25 up to
\$4.99 up to gal.

**SHINGLE &
SHADE**
LONG LASTING
TEXTURED FINISH
FIVE COLORS
\$4.99 gal.

LIQUID GLASS
OUTSIDE OR
INSIDE
2.5 lb. jar
\$3.99
5 lb. jar
\$8.99

ACTYLIC
INSULATED
EASY TO APPLY
EASY TO CLEAN
EASY TO REMOVE
EASY TO REPAIR
EASY TO BRUSH
EASY TO ROLL
EASY TO SPRAY
EASY TO TINT
EASY TO MIX
EASY TO STORE
EASY TO TRANSPORT
EASY TO USE
EASY TO APPLY
EASY TO CLEAN
EASY TO REMOVE
EASY TO REPAIR
EASY TO BRUSH
EASY TO ROLL
EASY TO SPRAY
EASY TO TINT
EASY TO MIX
EASY TO STORE
EASY TO TRANSPORT
EASY TO USE

CHINA LUXE
EASY TO APPLY
EASY TO CLEAN
EASY TO REMOVE
EASY TO REPAIR
EASY TO BRUSH
EASY TO ROLL
EASY TO SPRAY
EASY TO TINT
EASY TO MIX
EASY TO STORE
EASY TO TRANSPORT
EASY TO USE

ALUMINUM FLAT
EASY TO APPLY
EASY TO CLEAN
EASY TO REMOVE
EASY TO REPAIR
EASY TO BRUSH
EASY TO ROLL
EASY TO SPRAY
EASY TO TINT
EASY TO MIX
EASY TO STORE
EASY TO TRANSPORT
EASY TO USE

SPARKLE ALUMINUM
EASY TO APPLY
EASY TO CLEAN
EASY TO REMOVE
EASY TO REPAIR
EASY TO BRUSH
EASY TO ROLL
EASY TO SPRAY
EASY TO TINT
EASY TO MIX
EASY TO STORE
EASY TO TRANSPORT
EASY TO USE

1114 17457

ACTULAC
ROLL-ON
EASY TO APPLY
NO "TANNING" ODDS
10-MINUTE DRYING
12.35 ea.
\$4.99 ea.
\$1.00

[illegible]

**TRIM & BACK
ENAMEL
INTERIOR-EXTERIOR
EASY DRIPPING
EXCEPTIONAL
FINISH**
\$2.25 up ea.
\$4.98 up gal.

**SHINGLES &
SHADE
LONG LASTING
TEXTURED FINISH
FIVE COLORS
\$6.98 per sq.**

**LIQUID GLASS
OUTSIDE OR
3 Master Locks
For Better Climate
2-Year Guarantee
\$1.00 ea.
\$2.00 ea.**

46.91 止

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DOMINATE TRADE CONTINUES

Mary Carter Paint Factories

1125 Roosevelt Ave., York

**Open Wed. & Fri.
UNTIL 9 P. M.**

Phone 46-3740

323 3/16/76

BUY 1 AND GET 1 FREE

BUY A GALLON GET A GALLON FREE
BUY A QUART GET A QUART FREE



ALKYD FLAT

Easy to brush or roll on
long lasting and extra wash
able. Custom blending in
hundreds of exciting new
shades.

\$2.25 qt. \$4.98 gal.

LIQUID GLASS OUTSIDE OIL
EASY APPLICATION
SUPERIOR LEVELING
EXCELLENT DRYING
\$3.00 qt. \$8.98 gal.



FEDERAL TRADE COMMISSION

Exhibit No. 49-10 Supplemental Exhibit No. 49-11
5-3-6

CHINA LUXE

For the look of velvet, the
sheen of satin. Medium gloss
enamel in a variety of ex-
citing shades.

\$2.25 qt. \$6.98 gal.



MARY CARTER PAINT STORES

6800 DIXIE HIWAY
Across from Dixie Manor
WA 1-2419

2223 BARDSTOWN RD.
At Douglas
GL 1-9090

Locating a Home is EASY Through the Rental Ads

325

LEADER-CALL, LAUREL, MISS., TUESDAY, AUGUST 16, 1960

9

Mary Carter says:
**'Satisfied Customers
 are my
 most Important Products.'**

"Yes, satisfied customers are the real secret of my success! 'Every second can of paint free of extra cost' has persuaded countless thousands to try Mary Carter products the first time — but only the very best results with the paint itself could possibly persuade them to use it again and again. So, next time you're ready to re-decorate, think twice about the paint you buy . . . get twice as much as you pay for with my 'share the profits' plan, **BUY ONLY HALF THE PAINT YOU NEED** at any Mary Carter paint store, where you get . . .



Every 2nd Can

FREE

Of Extra Cost."

FEDERAL TRADE COMMISSION
 [Initials] 8-16-60
 Exhibit No. 50

**FREE CUSTOM TINTING**

Factory-trained paint specialists will custom-tint any shade you may require to harmonize with the color scheme of your home. There's no charge for this professional service, and you can be sure of professional results every time!

LIQUID GLASS ENAMEL
 with the above-mentioned special tinting service guaranteed

DOCKET NO. 5-3-61
 IN THE MATTER OF Mary Carter Paints
 PLAINTIFFS
 DEFENDERS
 ALL TRADE COMMISSION EXHIBIT NO. 50
 DATE 5-3-61
 BY AGENT REPORTING CO., CHICAGO, ILL.
 582

HALF THE PAINT YOU NEED AT ANY MARY CARTER PAINT STORE,
where you get...



Every 2nd Can

FREE

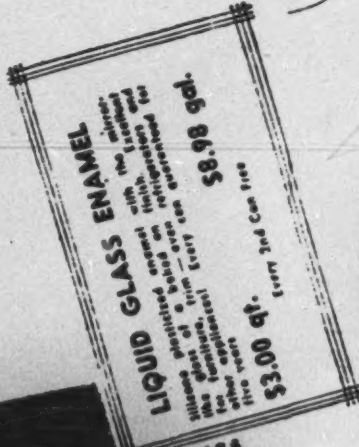
Of Extra Cost."

FEDERAL TRADE COMMISSION
[Sealed by 8/5/9. Important Exhibit No. 53, 95.
S-5-6]



FREE CUSTOM TINTING

Factory-trained paint specialists with equipment can tint any shade you may require to harmonize with the color scheme of your home. There's no charge for this personalized service, and you can be sure of professional results every time!



ACRYLIC ROL-LATEX

Interior-exterior use. 20-minute drying. Easy water clean-up.

\$2.25 qt. \$4.98 gal.

Every 2nd Can Free



CHINA LUXE

Satin medium gloss. Many beautiful shades. Rapid drying.

\$2.25 qt. \$4.98 gal.

Every 2nd Can Free



SPAR VARNISH

Multi-purpose. Waterproof. High gloss. Interior. Exterior.

\$2.25 qt. \$4.98 gal.

Every 2nd Can Free



LIQUID GLASS OUTSIDE OIL

Super glossy finish. Mildew resistant. Five-year guarantee.

\$3.00 qt. \$8.98 gal.

Every 2nd Can Free

World's
Largest Operation
Of Its Kind



MARY CARTER Paint Factories

LAUREL BRANCH STORE

986 So. 13th Ave.

Dial 4492

204

327

219



[fol. 271] **BEFORE THE FEDERAL TRADE COMMISSION**
COMMISSION'S EXHIBIT No. 60

IMPORTANT

April 11, 1960

To All Stores

Many of our competitors who are envious of the great expansion and growth of Mary Carter seek to undermine our sales position in various ways.

The stated Mary Carter merchandising plan has always offered our paint products at the regular list price which retails our paints in an approximate price range with comparable quality national paint brands. Every purchaser is then entitled to receive the same equivalent quantity of product without extra cost in the form of a free second can. Our publicly stated sales policy is violated if any customer at a Mary Carter store is allowed to buy one can of paint at half price. We are under continuous scrutiny by the Federal Trade Commission and a violation of our merchandising policy allows our competition to allege that our advertising is misleading because every customer is not granted a second can free but that we merely double our price in order to give the free second can.

In the future, any reports of a dealer engaging in unlawful pricing practices on our paint products will be cause for possible cancellation of the franchise contract.

Mary Carter Paint Factories, Robert Van Worp, Jr.
 President.

Crosby, Exhibit 4, Obtained 9/16/60, By HLS, Attorney
 Examiner.

File No. 6023643.

[fol. 272] BEFORE THE FEDERAL TRADE COMMISSION
COMMISSION'S EXHIBIT No. 66

MARY CARTER PAINT FACTORIES
Gunn Highway at Henderson Road
Tampa 7, Florida
Post Office Box 4118
Telephone WE 5-3151

June 5, 1959

Strickland & Son
Mary Carter Paints
3677 Clairmont Road
Chamblee, Georgia

Gentlemen:

We have had several reports that you are selling single unit quantities at half price. It is not important to me to know whether or not you actually are. Possibly these reports are false. However, I would like to point out that if you are making a practice of selling single unit quantities and are shopped by a member of the FTC or some other Government organization who finds you to be deviating from our standard selling policies and any suit evolves, we will wash our hands of the affair.

It has also been brought to my attention that you have received 50 China Luxe quart labels per month for the last three months. This indicates that you are repacking China Luxe to gain 10 or 15 cents per quart extra profit. You know as well as we that you can't get quite 4 quarts of paint out of a gallon, so one of the cans must be either short in measure or filled with a thinner of turpentine or mineral spirits. In either case, the practice is bad and we will not ship any more quart labels to you from now on.

There is no prejudice intended in this letter; it is just that I hope you and the company can work mutually toward better co-operation.

Very truly yours, Mary Carter Paint Factories,
Robert Emerson.

Strickland, Exhibit 6, Obtained 6-20-60, By [illegible],
Attorney-Examiner.

File No. 6023643.

[fol. 273] **BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSION'S EXHIBIT No. 67

THE CITY OF MIAMI, Plaintiff,

vs.

MARY CARTER STORES OF GREATER MIAMI, INC., Defendant.

Before: Hon. Mitchell M. Goldman, Judge.

Miami, Florida

September 17, 1958

[fol. 274] Thereupon: ROBERT VAN WORP, was called as a witness on behalf of the defendant and, after having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wahl:

Q. Will you state your name, please.

A. Robert Van Worp.

Q. Do you hold an official position with the defendant here?

A. I do.

Q. What is that position?

A. I am president of the corporation.

Q. How long have you held that office, Mr. Van Worp?

A. Since the corporation was formed.

The Court: Speak up a little louder.

Q. Please do not spar with me. When I ask you how long it has been, do not say, "Since the corporation has been formed."

Let me know how long ago it was.

A. I believe the corporation was formed in 1954 and I, since then, have been president of the corporation.

Q. That corporation is the Mary Carter Paint Stores of Greater Miami, Inc.?

[fol. 275] A. That's correct.

Q. That particular corporation, which is the defendant here, is a wholly owned subsidiary of the Mary Carter people, the parent company?

A. Yes, sir.

Q. What is the name of the parent company?

A. Mary Carter Paint Factories. It is also a corporation.

Q. How long has that corporation been in existence?

A. Since 1950 or '51.

Q. Are you president of that corporation likewise?

A. Yes, sir.

Q. Does the Mary Carter Paint Company, shall we say, operating through those parent and subsidiary, similar to this defendant involved here, conduct its business in interstate commerce?

A. Yes, sir.

Q. Is it in such operation subject to the jurisdiction and regulation and control of the Federal Trade Commission?

A. Yes.

Q. Mr. Van Worp, it was stipulated at the beginning of this case that the advertisement upon which the charge is based—that is in so far as the advertisement is concerned—was placed by the company.

Is the advertisement which is here under consideration [fol. 276] the standard format used by the parent company and its subsidiaries throughout the United States or in the states in which it operates?

A. Yes, sir, largely.

Would you like a further clarification of that?

Q. All right, sir.

A. Generally speaking, where the volume of the area would permit a like volume of advertising, the same advertisement once it has been designed and matted up, is sent in to all of the areas which are, in economic plane, will sustain that volume of advertising.

Q. In other words, what you mean is when you advertise and where you advertise you use the same format?

A. That's right.

Q. Has the Federal Trade Commission ever raised any question about this advertisement?

Mr. McVeigh: I object to the question. I do not think it is relevant whether the Federal Trade Commission has ever reprimanded them for advertising.

The Court: I will sustain the objection.

Mr. Wahl: I think it is very relevant in view of the fact this is a company engaged in interstate commerce with a regulatory authority in charge of it.

The Court: Regulations as to what?

[fol. 277] Mr. Wahl: As to advertising.

I can reply there, if Your Honor has any question in his mind about the function of this particular agency.

Mr. McVeigh: I agree that these regulations pertain to whether you can advertise in interstate commerce. However, that does not necessarily mean our standard is the same as the Federal Trade Commission, or the standards of other states.

We are concerned with a violation of an ordinance of

the City of Miami. I do not think you can make an analogy between that and the Federal Trade Commission ordinance or regulation.

He is charged specifically with violating these ordinances. Anything that he might bring in here would only tend to explain, maybe, what the federal regulation is.

The Court: It would not have any bearing, regardless what his answer would be to the question.

Mr. McVeigh: I do not think our ordinance reads the same. He knows the ordinance or the regulation of the Federal Trade Commission.

If he was in violation of that I think that probably it would be pertinent or relevant to the issue. I do not think it is unless he can say exactly what the regulation is; what he is talking about.

Mr. Wahl: I confess to Your Honor that I do not have [fol. 278] the regulation before me.

I simply say that where a company is engaged in interstate commerce, where it has widely disseminated in the various newspapers, using the same format of advertising—

Excuse me, if Your Honor please. Mr. Howard has just handed me something.

[Discussion off the record.]

Mr. Wahl: I should like to offer this, if I may, which I just received from the City.

Mr. McVeigh: We will offer it as a joint exhibit.

The Court: That is being congenial enough. We will put it in as a joint exhibit.

Is FTC the Federal Trade Commission?

Mr. Wahl: Yes.

[The document referred to was received in evidence as Joint Exhibit #1.]

Q. That regulation having been offered and received in evidence as Joint Exhibit 1, I will ask you again, Mr. Van Worp, if your parent company or any of the subsidiaries have ever been challenged as to this type of advertising by the Federal Trade Commission.

Mr. McVeigh: I object, Your Honor. It is not relative as to whether they were charged or not. The fact is that

whether they have been charged or not does not mean they [fol. 279] should not have been charged or could not have been charged.

I do not think it has any bearing on this case.

Mr. Wahl: If Your Honor please, I do not quite follow what Mr. McVeigh is saying. If I show this regulation has a similarity to this ordinance, he can have no objection.

The Court: I will let him answer the question.

Mr. McVeigh: Your Honor, I contend the question is asked for the purpose of showing whether or not the man has ever been charged with the same violation. I do not think it has any bearing whether he has ever been charged with another violation, whether it be another ordinance or even the same one.

The Court: I said I would let him answer it.

A. Do you mean has any representative of the Federal Trade Commission scrutinized our advertising?

Q. All right. What is your answer to that?

A. Yes, they have.

Q. Having scrutinized that, have they raised any complaint about it or ordered you to change this type of advertising—the free gallon with each one purchased?

A. No, sir, they never have.

The Court: Off the record.

[Discussion off the record.]

* * * * *

[fol. 280] The Court: It will be Defendant's Exhibit #5.

[The document referred to was received in evidence as Defendant's Exhibit #5.]

Mr. Wahl: May I give you the cover page which will identify the nature of the survey?

The Court: All right.

Q. Mr. Van Worp, the charge that is made here is that on the 27th of February, 1957, in the City of Miami, Mary Carter Paint Stores of Greater Miami, Inc., authorized to do business in the State of Florida, did then and there cause, directly or indirectly, to be published in the Miami

Herald an advertisement containing therein "A free gallon with every one you buy."

Up to that point, is that correct?

A. Yes.

Q. It continues: "A consideration for the alleged free gallon is included in the advertised price since a gallon quantity can be purchased for less than the advertised price."

Is that charge true?

A. No, sir, that is not true.

Q. Can a customer walk into your store and buy a gallon of Rol-Latex paint for less than \$6.98?

A. Under no circumstances.

Q. What is your method of operation? Will you explain it to the Court.

[fol. 281] A. You mean how do we sell the stuff?

Q. Your method of operation under your advertisements.

A. With respect to the sale parallel to this one?

Q. Yes.

A. Well, we offer a gallon with each gallon you buy; that is a free gallon with each one you buy.

Q. Is your offer confined only to gallons or does it extend to other quantities?

Let me ask you this first: Do you pack paint in quantities of less than a gallon?

A. We pack a number of items in quarts.

Q. Is the offer of an extra can, when you purchase one quart— You mentioned a gallon a few minutes ago. Does a free can extend as well to quarts as it does to gallons?

A. Yes.

Q. Outline to the Court your modus operandi.

A. Although I'm just slightly confused about this particular incident, it revolves around the method that we would have to protect the customer when they wanted to acquire an uneven number of gallons of paint.

Now basically in our merchandising that has always been a problem because occasionally it will arise a customer has a need or a use for only a single gallon or three or five or any other uneven number of gallons of paint.

[fol. 282] Our policy with respect to the sale of our product provides that if a customer has a need for only one

gallon of paint which falls within any one of our price categories, \$5.98, \$6.98, \$8.98, or whatever it may be, has his free gallon. He may receive another product of the same price structure or lower as his free gallon.

Now when it comes down to a customer coming in and saying, "I want three gallons of the particular product," our instructions, our policy to all of our salesmen, is to try to reasonably point out to the customer that in order to effect this merchandising policy of ours to his best advantage the fourth gallon can be a selection of some other product in order for him to get the maximum return for the dollar spent in our store.

Upon several occasions, to my knowledge, we have run into people who just couldn't use that free extra gallon. We try to make it for an even number of gallons.

In other words, if you buy two, you get two free. Consequently, you wind up with four. When they want three or five or seven it does project a little bit of a problem.

The only way we have been able to satisfy that customer and ourselves, or come as close to it as we can morally and ethically is to take a quart can of that price line—which if it is \$6.98 a gallon, the quart price is \$2.25—and sell him [fol. 283] two quarts of that, and he gets two quarts free thereby acquiring one free gallon in connection with the balance of his purchase.

Q. If he actually purchased four quarts, how many quarts would he be acquiring?

A. Then, he would get eight quarts.

Q. If he purchased them?

A. Yes. If he purchased them as quarts.

The Court: Do you mind my interrupting?

Mr. Wahl: No.

The Court: In other words, if he buys four quarts—if he comes in and says, "Either one gallon or four quarts," and if he purchases one gallon he gets a gallon with it free, and in the case of four quarts, he get four quarts—or do you give him a big gallon or do you give him four quarts?

The Witness: It depends upon our price structure.

The Court: The same price structure, let us say. We are going to get this Rol-Latex at \$6.98 a gallon.

Suppose I came in and I wanted four quarts of it. Would

you give me a gallon can, two gallon cans, or would you give me eight quarts?

The Witness: Well, if you specify four quarts, you would get eight quart cans. But the reason for that, obviously, in most circumstances it would be because you wanted a [fol. 284] variety of colors.

The Court: I said the same color, and I want the four quarts.

The Witness: We would certainly outline the advantage to you of purchasing by the gallon.

The Court: The cost is \$2.25 a quart?

The Witness: Yes.

The Court: As opposed to \$6.98 a gallon?

The Witness: Yes.

Mr. Wahl: I may suggest, Your Honor, it is the usual differentiation. It is a matter of practicality. It is the packaging in the smaller sizes.

Aspirin is a good example. You can buy one hundred tablets for fifty cents, but if you buy twelve you pay fifteen cents for them. It is the packaging that is involved which increases the quart price or the unit price.

Q. May I ask you this, Mr. Van Worp: Quite frankly, the record presents an unusual situation in that this gallon can which is offered in evidence and which contains only half was measured into these two quart cans.

Will you explain to the Court the reason for that.

A. This product Rol-Latex is somewhat more resinous than many of our other products. This particularly refers to our experience in our operation, as to the technology [fol. 285] of maintaining shade equalization that is close enough colors that when you paint a wall you don't end up with a strip down it showing a variation in colors. That has been one of our larger problems in connection with this product.

I believe that is so with all latex paint; that being of an alkaline nature, the alkali put in for the preservation of the paint in its present state has a tendency to deteriorate the color in the can.

We know that primarily the average customer wants to get their whole room, or whatever they are painting, the same color. We produce this material in lots of several hundred gallons at a time, and we ask our salesmen to keep

a sequence, a rotation of these in such a manner that a customer does not get two or more cans out of two or more lot numbers.

The Court: Different lots.

A. [Continuing] For the apparent reason that we might subject them to a can that would be more or less untenable. That was so up to the time this sale was made. Recognizing that factor, we had permitted our salesmen in the stores that, where it was necessary to acquire an uneven number of gallons of paint or quarts to break the package in an effort to keep these lots segregated because quarts and gallons cannot move out at the same rate of time.

I mean, a quart inventory of one lot might stagnate on [fol. 286] the shelf much longer than the gallons of the same lot and, consequently, you find a variation in shade.

Now largely, we have overcome that situation and as a result of this action, we now carry a stock of quarts in our stores; but our objective in filling the requirements of the customer for an uneven number of gallons is always to make it possible, if possible within the scope of our merchandising policy, for him to acquire his total needs at the lowest possible cost in connection with our price structure.

Does that sufficiently answer it?

Q. I hope the Court will not feel that I am coaching you, but is there any recognition of convenience of having a gallon to paint out of it?

A. Well, with respect to that, when it is necessary to break a gallon in order to execute our quart price, there was a certain amount of leeway projected to the customers saying, "Would you prefer to have our two free quarts instead of the gallon can?"

The normal procedure in using paint, it makes it physically more convenient for a person to paint out of one of these things, if he is painting a wall and using a brush that is larger than will fit in a quart can. In those cases, we permit him to take these two free quarts in the gallon container because it is just easier for him to use it that way. [fol. 287] Most people when they use a gallon of paint that is full, they measure it out before they start to paint. It was a matter of convenience.

It is our instructions to our salesmen at the point of sale to always give the customer the option as to whether he would prefer it in a gallon can or whether he would prefer it in quart containers.

The Court: As to this particular sale, you do not know?

The Witness: I have no personal knowledge of this particular sale, sir. Out of this, we have made that procedure, I mean, strictly as we think we would be required to carry it out under the ordinance.

Q. Mr. Van Worp, while you were not present at this particular transaction, would you tell us how often you visit the stores over here in Miami.

A. Well, I visit the Miami area on an irregular schedule; but generally, at least every couple weeks. Now I don't visit all of the stores on every occasion. Generally, most of my business is transacted with my supervisor who is in charge of the group of stores in this area.

Q. Do you recall at the time this transaction occurred whether this particular type of paint was being put up in gallon units or were there some quart cans?

[fol. 288] A. The fact is we were only putting it up in gallon units.

Q. When did this incident come to your attention? How soon was it after the events occurred; do you recall?

A. I believe that my first knowledge of it was when Mr. Howard sent me a letter. I don't know the specific date.

Q. Do you know whether or not at this time this particular store had quarts on hand of the Rol-Latex?

A. As a pre-designed stock, that store did not carry the quarts.

Mr. Wahl: I have no further questions.

The Court: Mr. McVeigh, do you have any cross examination?

Cross-examination.

By Mr. McVeigh:

Q. Mr. Van Worp, if a person wanted to purchase an odd number of gallons, what would be the price of the odd gallon in any of your stores?

A. Well, the price of the odd gallon, if he wanted to purchase it, would be the list price of the gallon of paint.

The Court: Clarify "list price." Let us take that first.

The Witness: This set is advertised at \$6.98? To buy that gallon of paint it would cost \$6.98.

The Court: Whether or not you take the free one?

[fol. 289] The Witness: That's correct.

Q. So that, whether it was the first gallon, the third, fifth, seventh and so on, you say the price is \$6.98 for that particular type of paint per gallon?

A. That's correct.

Q. You heard the testimony of Mr. Howard that he purchased a third gallon of paint broken down by quarts, two quarts in a half gallon. Is that correct?

A. No.

Q. Did you hear Mr. Howard testify to that?

A. That was my impression, although—

Q. He did not testify that he purchased the third gallon. They took this can and poured it into these two quarts, half of this gallon can.

A. Yes.

Q. He paid \$2.25 for the first two quarts and \$2.25 for the half gallon.

A. Oh, no. That is not correct.

Q. What is correct?

The Court: I think it is.

A. He paid \$2.25 for this quart and for this quart [indicating]. These were his two free quarts [indicating].

The Court: In other words, the total price for these two quarts and the half gallon was how much?

[fol. 290] The Witness: The total price, the only price, was for these two quarts [indicating]. He didn't pay anything for that [indicating].

Q. How many quarts are there in a gallon?

A. Four.

Q. The testimony has been that he paid for these two quarts, and he got this half gallon or the two quarts?

A. Yes.

Q. As a matter of fact, he actually paid \$4.50 for the gallon. Is that not a matter of fact?

A. No.

Q. How do you account for or explain away the fact that these two quarts and this half gallon represent a gallon of paint that he paid \$4.50 for?

A. Can I answer informally? I mean, he would be buying two gallons of this paint for \$6.98, by the same reasoning he knows he is not buying one gallon for \$6.98, because the other one is free.

Here, he bought two quarts for \$2.25 apiece and then here is free equity as a parallel to this transaction and this is a parallel to this transaction [indicating].

Q. How do you explain that again? This is the last gallon he purchased. He paid \$4.50 for it, yet he paid \$6.98 for the first gallon.

[fol. 291] A. No. He paid \$4.50 for two quarts. These two quarts were free. It was the same thing.

The Court: Just a minute. Let us go slow here.

Correct me, somebody, if I am wrong. I am under the impression that Mr. Howard said, on his direct examination, that at the time he went into the paint store he said he wanted three gallons of paint. He went in to buy three gallons of paint.

I do not think there was anything mentioned about quarts. He went in to buy three gallons of paint. He came out with two one-gallon jugs and a half full or half empty gallon jug and two quart containers that were full.

Mr. Wahl: If Your Honor please, that was my understanding of it.

Mr. McVeigh: Mr. Howard testified that he bought this gallon and got this one free [indicating]. True. He went in said to the man, "I want to purchase three gallons of paint."

Mr. Wahl: Yes, sir. He was told—

The Court: That is what I heard him testify to myself.

This is what he got out of the three gallons of paint, what is in evidence as the exhibit.

Mr. Wahl: My recollection is he said he was told that they would have to break it. He would have to buy quarts.

The Court: I wonder if the court reporter can go to the first part of the testimony. We might have to do so if he [fol. 292] can find it.

Can you read that part of the direct testimony?

[The testimony referred to was read by the reporter.]

The Court: That was my recollection of it.

Mr. Wahl: Yes, sir.

Q. Mr. Van Worp, if an individual desires to purchase three gallons or five gallons or an odd number of gallons of paint, what, if anything, do they have to pay for the odd gallon?

A. The odd gallon costs them exactly as much as any one of the other gallons they buy.

Q. In this particular case, where the testimony has been that Mr. Howard here attempted to purchase three gallons of paint in one of your stores, and the fact that he paid only \$4.50 for this third gallon, can you explain why he did not have to pay \$6.98 for that third gallon as if it had been a single gallon?

A. Because he purchased—he acquired it through purchasing two quarts at the quart price, and the other two quarts of that third gallon was the free equity.

Q. Is it not a fact the consideration for that free gallon is included in the first gallon?

A. No.

Q. Sir, as a practical man, as a businessman, you mean to [fol. 293] tell me that you charge \$6.98 for this first gallon?

A. Yes, sir.

Q. You give this gallon absolutely away free?

A. That's correct.

Q. You say there is no consideration for this second gallon other than the purchase of the first?

A. That's right.

Q. \$14 worth of paint, approximately, for half price; is that about what it figures up to?

A. That's right.

Q. Is it not a merchandising technique rather than actual

price because, certainly, this can of paint is worth something; is it not?

A. We think it is worth something.

Q. Do you think it is worth—the second gallon of paint—as much as the first one? You said the second gallon is worth \$6.98.

A. Yes.

Q. You do not charge anything for it?

A. No.

Q. Is not part of the consideration for that included in your first gallon?

A. No, it is not.

Q. Why is it not, sir?

[fol. 294] A. Because, here, irrespective of how the person acquires the gallon of paint or whether they get the free gallon or not, that is the price that we have set upon that as its value and its retail sales price.

The Court: I think I know what the City attorney has in mind.

Q. As a matter of fact, if you did not give away a gallon you could reduce your price on the first gallon; could you not?

A. Well, I don't know. I don't think so.

Q. What your testimony comes to is that you could produce this second gallon of paint for nothing?

A. No, I didn't say that. I said that the price that we have put on this gallon of paint, we feel is a represented value, a fair value, fair price, and that there is no charge whatever for this second gallon.

Q. For how long, sir, have you been giving these second gallons or quarts away free?

A. About seven years.

Q. Prior to that, sir, what was your system of selling this paint?

What I am getting to is this, Mr. Van Worp: Did you sell a gallon of paint for a price less than what it is today considering the increase in price over the years for the same price you now sell it for giving away a second free gallon?

[fols. 295-362] A. We didn't make that specific product at that time.

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[fol. 363] IN THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—February 6,
1964

[Title omitted]

On this day this cause was called, and after argument by David W. Peck, Esq., for petitioners, and Charles C. Moore, Jr., Esq., Federal Trade Commission, for respondent, was submitted to the Court.

[fol. 364] IN THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

No. 19982

MARY CARTER PAINT CO., A CORPORATION, JOHN C. MILLER
AND I. G. DAVIS, JR., AS OFFICERS OF SAID CORPORATION,
AND ROBERT VAN WORP, JR., Petitioners,

versus

FEDERAL TRADE COMMISSION, Respondent.

Petition for Review of an Order of the Federal Trade
Commission

Before HUTCHESON and BROWN, Circuit Judges, and
CHRISTENBERRY, District Judge

OPINION—June 19, 1964

HUTCHESON, Circuit Judge: This case is before the court on a petition to review and set aside a Federal Trade Commission order directing petitioners to cease and desist from engaging in certain unfair and deceptive practices and unfair methods of competition in connection with the interstate sale of paint.

[fol. 365] The Commission's complaint charged that petitioners, in connection with the interstate sale of paint, had published advertisements which falsely represented "that

the usual and customary retail price of each can * * * is the price designated in the advertisement; that this advertised price is a factory price; and that if one can * * * is purchased at the advertised price, a second can will be given 'free' * * *". In their answer, petitioners admitted the publication of the advertisements, but denied the misrepresentations alleged.

The undisputed facts as developed at the hearings before a hearing examiner of the Commission are set out in the margin.¹

¹ As pertinent, these are the facts:

Mary Carter Paint Co. is engaged in the business of manufacturing, selling, and distributing paint under the trade name of "Mary Carter". At the time of the hearings, the company distributed its paints in more than 27 states of the United States through over 500 retail outlets, including both company stores and franchise dealers. Although still a small company in the paint industry (its share of national paint sales is under one percent), the company has increased its sales from one million dollars in 1955 to twelve million dollars in 1960, a growth achieved by increasing the number of retail outlets and building the repeat business of satisfied customers.

The basic business policy of Mary Carter, consistently followed over the past ten years, has been to manufacture and sell paint of high quality at a net cost to the consumer of half the amount he would pay for paint of comparable quality manufactured by leading national brand companies. This policy of giving "double value" is carried out in a merchandising practice of pricing a can of Mary Carter paint at a price comparable to the price of national brand paints of comparable quality, and advertising and giving the purchaser a second can free. Thus, typical Mary Carter advertising in newspapers, magazines, radio, television, store signs, lithographed can tops, and truck sides, states: "Buy One, Get One Free"; "Every Second Can Free of Extra Cost"; "Every Second Can Free".

Mary Carter's merchandising policy and the reason for it are specifically stated in advertisements which explain that Mary Carter paint is "quality priced" and that the company will not "second rate" its paint with a low-price

[fol. 366] After hearing the evidence, the hearing examiner issued his decision wherein he found that petitioners had not misrepresented that their advertised price was a factory price, but had misrepresented the usual and regular price of their paint and had falsely represented that a second can was given free with every can purchased. Ac-

tag—a point of particular importance in a market in which the leading paint manufacturers have combined in a sustained publicity campaign to inculcate a public psychology equating quality with price. [Evidence on this latter point was excluded below, and the petitioner here urges that such exclusion was erroneous.]

The quality of Mary Carter paint is not questioned. Indeed, at the hearing, Commission counsel contended that the quality of Mary Carter paint was not an issue, and the hearing examiner ruled that the evidence offered on the subject by Mary Carter was immaterial. The Commission has upheld that ruling. The evidence was taken for reporting, however, and both the evidence and the examiner's report of the evidence establish that Mary Carter paints are as good as, or superior to, paints marketed under leading national brand names at prices comparable to the single can price of Mary Carter paints. [The exclusion of this evidence constitutes one of petitioners' exceptions to the decision below.]

In accordance with Mary Carter's consistent merchandising practice, the single can price of its paint is the advertised price for a single can and the only price at which Mary Carter paint can be purchased, the purchaser being entitled to receive without extra cost a second can of the same kind of paint or of any other similarly or lower priced Mary Carter paint. Naturally, the purchaser will usually take the second can, but this is optional with him; at times he takes only the single can, and the price paid is the same single can price.

There was no evidence, at the hearing, of consumer complaints or of any deception of Mary Carter customers. The extent of consumer satisfaction with Mary Carter paints and with the value offered and given is indicated, however, by the company's increased sales and, particularly, its repeat-customer sales.

cordingly, he issued an order to cease and desist, designed to prohibit the practices found to be violations of the Federal Trade Commission Act.

[fol. 367] On review, the Commission accepted the examiner's holding that Mary Carter's advertising was not permissible because the "free" second can of paint was not a gift or gratuity, though the Commission felt obliged to state in its decision that it did not thoroughly understand the hearing examiner's reasoning on this point, and in a detailed opinion² modified, and as modified adopted as its own, the initial decision and the order to cease and desist contained therein. Commissioner Elman filed a dissenting opinion.

It is the contention of petitioners: that the decision of the Commission is wholly unsupported by and not in accordance with the probative and substantial evidence and the law of the case; that on the one material issue of whether and how the advertising is misleading or deceptive there is no supporting finding; and that the decision of the Commission is arbitrary and capricious and not in accordance with law. Petitioners also contend that there were substantial errors in the exclusion of material evidence and that the order entered is too vague and imprecise to be meaningful, and that all of these are grounds for review and reversal by this court under the provisions of the Administrative Procedure Act, 5 U.S.C. Secs. 1006-9.

As to the order³ itself, it is petitioners' contention that it is no more than a generality of legal statement which [fol. 368] lacks any precision of meaning adequate to sat-

² In the Matter of Mary Carter Paint Co., Inc. et al.
FTC (628-62).

³ The order entered would prohibit Mary Carter from representing "directly or by implication":

"(a) That any amount is [its] customary and usual retail price of any merchandise when said amount is in excess of the price at which such merchandise is customarily and usually sold by [it] at retail in the recent and regular course of business;

"(b) That any article of merchandise is being given free or as a gift or without cost or charge, when such is not the fact".

isfy the requirement of clarity and applicability which the Supreme Court has said is the essence of a Commission order. *F.T.C. v. Henry Broch, Inc.*, 368 U.S. 360. For the reasons and upon the considerations hereafter stated, we agree.

The complaint and opinion of the Commission, Commissioner Elman dissenting, is that the second can is not "free" because it is not a "gratuity", that is the purchaser must buy one can to get the second can free, hence the cost of the second can is included in the price of the first can and the price paid is therefore the price of two cans rather than one can; and that it is misleading or deceptive to advertise that the second can is "free". The case, therefore, turns on and revolves entirely around Mary Carter's use of the word "free" in its advertising. There is no question or issue as to the quality of Mary Carter paint or as to the double value which it gives the public. The claim of the Commission is, however, that there is something misleading or deceptive in Mary Carter's expressing and advertising the bargain given in the terms of every second can "free".

The petitioners insist: that the opinion of the Commission is a mere quibble and in addition it is contrary to its established and long time rulings; that in *Matter of Walter J. Black*, 50 F.T.C. 225 (1953) and *Matter of Book-of-the-Month Club*, 50 F.T.C. 778 (1953), the Commission held that just such a bargain as Mary Carter gives can be expressed and advertised in the terms of a second article "free" with the purchase of one article; and that the Commission enunciated that rule after the most careful consideration and rejection of the argument which it now advances, that the second article could not be considered "free" because acquisition of the second article required the purchase of an article and hence there was no gratuity in the giving of the second article. In short, the transaction is the same as the well-nigh universal one cent sale practice where the merchants advertise that if you buy one article you can get another of the same article for one cent.

The majority opinion of the Commission states that the facts in this case are distinguishable from the facts in the *Black* and the *Book-of-the-Month* cases. Petitioner, however, and we, as the reviewing court, are in the fortunate

situation in this case that Commissioner Elman, speaking not as the scribes and pharisees and the bureaucrats do, but as one having authority, has clearly, vigorously and incontrovertibly pointed out in his dissenting opinion the fallacious and quibbling nature of the majority's effort to support its position and to distinguish the cited cases.

Further, Commissioner Elman rightly noted, as "perhaps the most serious deficiency in the majority opinion", that "nowhere does the Commission explain what was 'unfair or deceptive' about what Mary Carter did"; and [fol. 370] finally Commissioner Elman found the order issued by the Commission so "indefensibly vague" and "puzzling" that he did not know how respondents could comply with it. It should be added that Commissioner Elman also aptly and devastatingly observed, "As a result, uncertainty and confusion are being introduced, needlessly and unsettlingly, into an area of business activity where businessmen and the bar have long and correctly regarded the Commission's position as definite and clear".

Contrary to the tone and tenor of most dissenting opinions, Commissioner Elman's opinion, instead of being a polemic directed at sustaining his own contrary view, is devoted to a careful, thoughtful and positive demonstration that the Commission, in reaching its conclusion, had devoted its efforts to tithing mint, anise and cummin, while neglecting and disregarding the weightier things of the law.

We find ourselves in agreement with Commissioner Elman's dissenting opinion: that the opinion of the Commission is completely erroneous; and that its order is lacking in the precision and definiteness which the statute requires of such an order as this. We reject, as Commissioner Elman does, the Commission's opinion: that Mary Carter's advertising is misleading because "The second can of paint was not, and is not now "free"; that it was not, and is not now given without cost to the retail purchaser since the purchaser paid the advertised price; and that this was, and is now, the usual and regular retail price at which two cans of Mary Carter paint were ordinarily sold. [fol. 371] In short, we agree with Commissioner Elman's demonstration that in sustaining the complaint in this case and holding that Mary Carter's advertising is misleading and deceptive in the respects alleged, it is clear that the

Commission has departed from its established rules, on which Mary Carter had "every right to rely", and has reverted to its discarded reasoning in the first *Book-of-the-Month Club* case. "This", as Commissioner Elman observes, "it has not done forthrightly", however, but by purporting to find that this case is "distinguishable" from the *Black* case, which it purports to still recognize as law. We agree with Commissioner Elman that the cases are "indistinguishable" and the decision of the Commission to the contrary is unsupported in law.

The brief of petitioners has presented in a thorough-going and lawyer-like way petitioners' position. We are spared, however, the necessity of more thoroughly presenting their views and arguments by the fact that we find it sufficient to say that we adopt and approve the reasoning and the result in Commissioner Elman's dissenting opinion,⁴ and particularly this concluding statement from it:

"This brings me to what is perhaps the most serious deficiency in the majority opinion. The duty of the Commission in this case was to determine whether Mary Carter had violated Sec. 5 of the Federal Trade Commission Act by engaging in any 'unfair or deceptive acts or practices'. Yet nowhere does the Com-[fol. 372] mission explain what was 'unfair or deceptive' about what Mary Carter did. The word 'deceptive' appears in the Commission's opinion on page 2 in a description of the allegations of the complaint and again on page 10 in the observation that a good motive cannot justify a deceptive practice. But we are never informed as to who is, or might be, misled by Mary Carter's 'Buy one and get one free' offer, or as to how that deception might be brought about."

Finally, Commissioner Elman noted⁵ that the Commis-

⁴ In the Matter of Mary Carter Paint Co. Inc. etc. FTC at page

⁵ "The Commission's order prohibits respondents from representing:

"(a) That any amount is respondents' customary and usual retail price of any merchandise when said amount is in excess of the price at which such mer-

sion's order to cease and desist was "indefensibly vague", [fol. 373] particularly in the light of the Supreme Court's recent call for Commission orders "sufficiently clear and precise to avoid raising serious questions as to their meaning and application".

It will be noted that throughout the briefs and arguments of the parties as to the error of the Commission, there is no claim that the Commission's error is in its findings of fact. Indeed, there could not be because the facts as to what the appellants did were undisputed. There was no evidence to the contrary of what they proved that they did, so that we are not confronted here with any question of the presumption attending the Commission's findings of fact. The evidence presented no conflict which would form the basis of such a finding, and the sole question presented here is a question of *law for the court*, whether the Commission's conclusions from the undisputed facts are legally supportable.

chandise is customarily and usually sold by respondents at retail in the recent and regular course of business'

" '(b) That any article or merchandise is being given free or as a gift, or without cost or extra charge, when such is not the fact. . . .'

"A reading of the order invites this question: What must respondents stop doing that they are now doing? Paragraph '(a)' declares that they may not call any amount their usual and customary price if it is in excess of their usual and customary price in the recent, regular course of business. Obviously, this has as little to do with the case as Guide V of the Guides Against Deceptive Pricing. Respondents have never sought to represent their 'recent' prices; they advertise only their current prices. As it happens, however, their current prices are the same as their recent prices. Whether regarded as a one-can or two-can price, respondents' advertised price of \$2.25 per quart, for example, is their 'usual and customary retail price' Now, and it is not in excess of \$2.25 per quart, which is 'the price at which such merchandise is customarily and usually sold by respondents at retail in the recent

In his annual message to Congress, January, 1936, the President, referring to the establishment of administrative bodies, declared:

"* * * in thirty-four months we have built up new instruments of public power. In the hands of a people's Government this power is wholesome and proper. But in the hands of political puppets of an economic autocracy such power would provide shackles for the liberties of the people."⁶

Some ten years later, the President transmitted to Congress, with his full endorsement and the statement that it was a great document of permanent importance, the report of his Committee on Administrative Management, which, because of the growth and intensification of administrative legislation of private enterprise and other phases of Ameri-

and regular course of business'. Does this mean that paragraph '(a)' has no effect at all on respondents' advertising practice? Surely not, or the Commission would not issue it. But what effect does it really have, and how are respondents to comply with it? I confess I do not know.

"Paragraph '(b)' is almost as puzzling. Presumably, it is intended to require respondents to cease advertising 'Buy 1 and get 1 Free'. But this cannot be deduced from anything to be found in the terms of the order. As the Commission's own troubles with the problem show, the definition of 'free' merchandise is no easy matter. Yet respondents are ordered, on pain of heavy penalties, to cease and desist from describing merchandise as free 'when such is not the fact'. Surely this provision, like paragraph '(a)', is indefensibly vague, particularly in light of the Supreme Court's recent call for Commission orders 'sufficiently clear and precise to avoid raising serious questions as to their meaning and application.' *Federal Trade Commission v. Henry Broch & Co.*, 368 U.S. 360, 368 (1962)."

*"The Public Papers and Addresses of Franklin D. Roosevelt," Vol. 5, p. 16.

can life, he had created, appointing to it wise and earnest men. In transmitting the report he took occasion to say that the practice of creating administrative agencies, which perform administrative work in addition to judicial work, threatens to develop a fourth branch of the government for which there is no sanction in the Constitution.⁷

To this the Committee added:

"There is a conflict of principle involved in their make-up and functions. * * * They are vested with duties of administration * * * and at the same time they are given important judicial work * * *. The evils resulting from this confusion of principles are [fol. 375] insidious and far reaching. * * * Pressures and influences properly enough directed toward officers responsible for formulating and administering policies constitute an unwholesome atmosphere in which to adjudicate private rights."

In June, 1946, the Congress enacted, and on June 11, the President approved the Administrative Procedure Act,⁸ and thus there had at last come about an Administro-Judicial Process established by legislative sanction and judicial approval.⁹

⁷ Cf. "All three existing arms of government being found inadequate to achieve the social purpose aimed at, a new type of body called a Commission, a government in miniature, is set up." John Willis, University of Toronto Law School, Vol. 4, p. 60, *Administrative Law, Selected Essays on Constitutional Law*, Foundation Press, 1938.

⁸ "An act to improve the administration of justice by prescribing fair administrative procedure." Chap. 324, Public Law 404, Laws of the 79th Congress, 2nd Session 1946.

⁹ "An administro-judicial process, beginning with administrative adjudication of the facts and ending with a judicial adjudication of the law, both as completely aspects of one adjudicative process as are the adjudication of the facts by trial judge or jury and the adjudication of the law on appeal." *Judging as Administration, Administration as Judging*, Texas Law Review, Vol. 21, Nov., 1942.

Because, as we have held above, the Commission's decision and order are not in accordance with law, its decision and order are REVERSED and the Commission is directed to enter an order dismissing the complaint.

BROWN, Circuit Judge, concurring specially:

I am in full agreement with the Court's result and with much of its opinion written by my distinguished Brother [fol. 376] Hutcheson. With no purpose to prepare a polemic or tithe "mint, anise and cummin," I would speak—"not as the scribes and Pharisees and the bureaucrats do," *cf. Thompson v. United States*, 5 Cir., 1964, . . . F.2d . . . [No. 20214, May 27, 1964] (dissenting opinion)—but as a special concurring Judge should, a few brief words to indicate the views which lead me to decision.

At the outset I am not troubled about the so-called undemonstrated deception. One thing clear is that Mary Carter's paint is not really sold at any of the advertised prices. Thus, the price of \$6.98 for the first gallon, the second one "free" is not the price at all for one gallon. Nor is it \$3.49 (one-half of \$6.98 for two gallons. Rather, it is \$4.50, represented by the cost of two one-quarts (\$2.25), getting for each, another "free" quart. For those who read and buy paint while running, I would suppose that Government might deem it appropriate to demand that at least one of the advertised prices be the correct one.

But at issue here is something more fundamental than house paint, bargains, or the American habit of self-delusion on "free" articles.

Our complex society now demands administrative agencies. The variety of problems dealt with make absolute consistency, perfect symmetry, impossible. And the law

"Under such statutes this court does not function as a tribunal exterior to the statutory administrative scheme, whose jurisdiction is invoked on constitutional grounds, to protect the applicant against the failure of the statute to provide due process. It functions as the tribunal of last resort, set up in the statute itself, for the correction of errors of law committed, and not corrected, in the course of the administrative procedures." *Leebern v. United States*, 124 F(2) 507. *Cf. U.S. v. Morgan*, 307 U.S. at p. 191.

reflects its good sense by not exacting it. But law does not permit an agency to grant to one person the right to do that which it denies to another similarly situated. There may not be a rule for Monday, another for Tuesday, [fol. 377] a rule for general application, but denied outright in a specific case.

That is what the Commission has done here. The precise action done here is permitted by *Black*, 50 F.T.C. 225 (1953). And even more unequivocal is the "Free Rule" [50 F.T.C. 235-236] patterned on it, but which has the positiveness of a rule, not a judicial-like opinion expounding a principle. These offers meet fully, honestly, and in good faith the requirement of Paragraph (2) found in each. Although Mary Carter's offer of the "free paint" is contingent on the purchase of a quart or a gallon, Mary Carter does not either (1) increase "the ordinary and usual price" or (2) reduce "the quality"; or (3) reduce "the quantity or size of the article of merchandise" which the customer is required to purchase.

Nevertheless, the Commission now holds that Mary Carter may not do what the Commission's two pronouncements clearly permit.

I am not arguing for *Black* in perpetuity. It may be bad or undesirable. The "Free Rule," emphatic as it is, may be worse. If so, the Commission should so declare. But so long as that is the rule, the Commission may not nullify it by individual decision while ostensibly holding it out as the standard for others.

With *Black* and the "Free Rule" not yet repudiated, Mary Carter is the victim of individualized discrimination. So long as *Black* stands, so long as the "Free Rule" stands, paragraph (2) must be fairly applied.

[fol. 378] As I did with the Interstate Commerce Commission in *Yellow Transit Freight Lines, Inc. v. United States*, N.D.Tex., 1963, (3-Judge), 221 F.Supp. 465, 469-71 (concurring opinion), I think the Federal Trade Commission has to make up its mind.

[fol. 379] IN THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

October Term, 1963

No. 19982

MARY CARTER PAINT CO., A CORPORATION, JOHN C. MILLER
AND I. G. DAVIS, JR., AS OFFICERS OF SAID CORPORATION,
AND ROBERT VAN WORP, JR., Petitioners,

versus

FEDERAL TRADE COMMISSION, Respondent.

Petition for Review of an Order of the Federal Trade
Commission

Before HUTCHESON and BROWN, Circuit Judges, and
CHRISTENBERRY, District Judge

JUDGMENT—June 19, 1964

This cause came on to be heard on the petition of Mary Carter Paint Co., a corporation, John C. Miller and I. G. Davis, Jr., as officers of said corporation, and Robert Van Worp, Jr., for review of an order of the Federal Trade Commission, and was argued by counsel;

On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court that the decision and order of the Federal Trade Commission in this cause be, and the same are hereby, reversed and the Commission is directed to enter an order dismissing the complaint.

“Brown, Circuit Judge, Concurs Specially”

Issued as Mandate: July 13, 1964.

[fol. 380] Clerk's Certificate to foregoing transcript
omitted in printing.

[fol. 381] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1964

No. 626

FEDERAL TRADE COMMISSION, Petitioner,

vs.

MARY CARTER PAINT CO., ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF
CERTIORARI—September 17, 1964

Upon consideration of the application of counsel for
petitioner,

It Is Ordered that the time for filing a petition for writ
of certiorari in the above-entitled case be, and the same is
hereby, extended to and including October 15th, 1964.

Hugo L. Black, Associate Justice of the Supreme
Court of the United States.

Dated this 17th day of September, 1964.

[fol. 382] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1964

No. 626

FEDERAL TRADE COMMISSION, Petitioner,

vs.

MARY CARTER PAINT Co., ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF
CERTIORARI—October 14, 1964

Upon consideration of the application of counsel for
petitioner,

It Is Ordered that the time for filing a petition for writ
of certiorari in the above-entitled case be, and the same is
hereby, further extended to and including October 26, 1964.

Hugo L. Black, Associate Justice of the Supreme
Court of the United States.

Dated this 14th day of October, 1964.

[fol. 383] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1964

No. 626

FEDERAL TRADE COMMISSION, Petitioner,

vs.

MARY CARTER PAINT CO., ET AL.

ORDER ALLOWING CERTIORARI—January 18, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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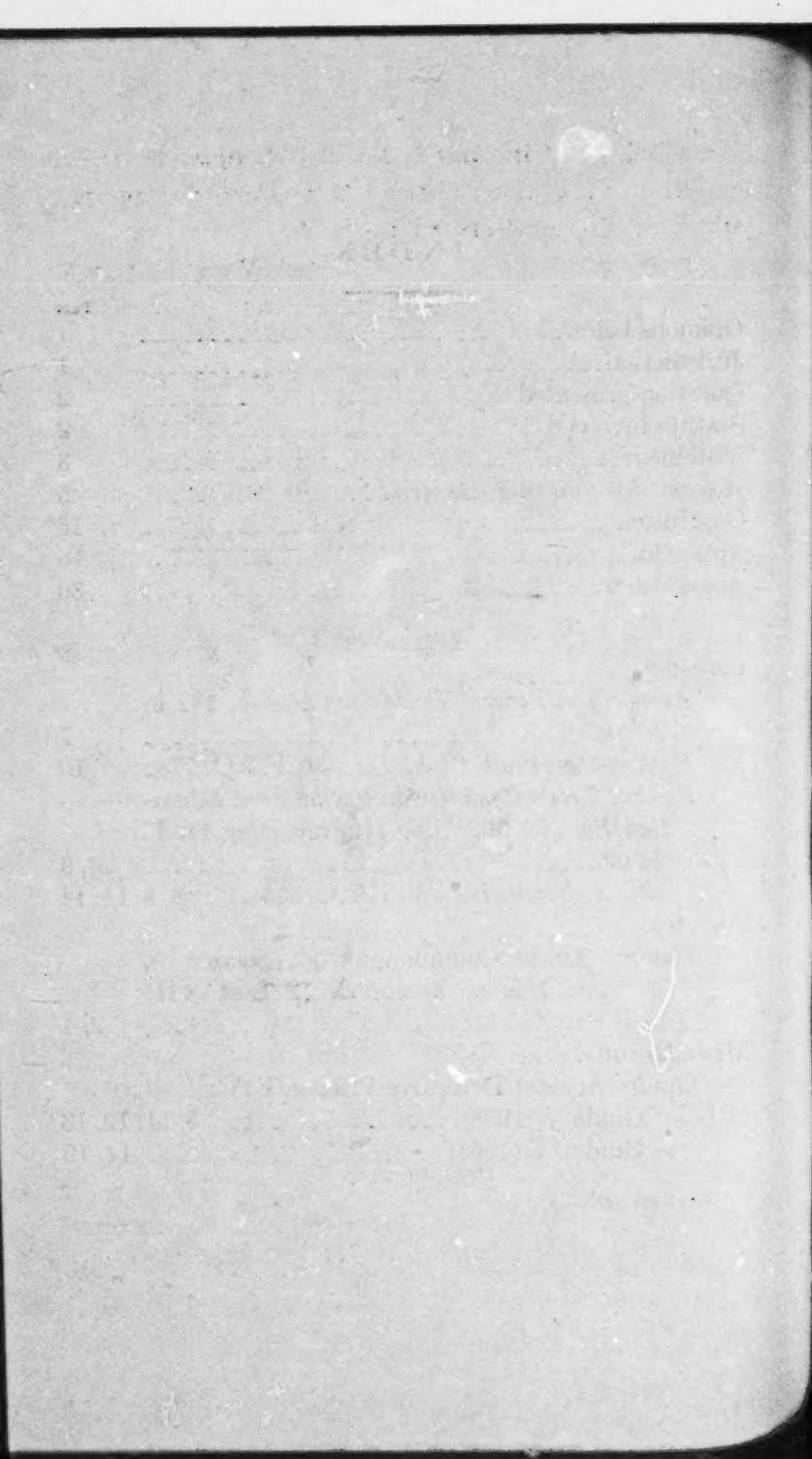
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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. —

FEDERAL TRADE COMMISSION, PETITIONER

v.

**MARY CARTER PAINT CO., JOHN C. MILLER, I. G.
DAVIS, JR., AND ROBERT VAN WORP, JR.**

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT**

The Solicitor General, on behalf of the Federal Trade Commission, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit entered in the above cause on June 19, 1964.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 16-29) is reported at 333 F. 2d 654. The opinion of the Federal Trade Commission (R. 55-91)¹ is not yet officially reported. The initial decision and order of the hearing examiner are printed at R. 28-54.

JURISDICTION

The judgment of the court of appeals was entered on June 19, 1964 (App. B, *infra*, pp. 30-31). On Sep-

¹"R." refers to the printed record in the court of appeals, nine copies of which are being filed herewith.

tember 17, 1964, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including October 15, 1964, and on October 14, 1964, he further extended the time for filing to and including October 26, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Trade Commission exceeded its authority in holding it to be an unfair or deceptive act or practice, violating Section 5 of the Federal Trade Commission Act, for a seller regularly to advertise that the purchaser of a single unit at a stated price will receive a second unit "free," when in fact the stated price has always been his regular price for two units.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U.S.C. 45, provides in part as follows:

(a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

* * * * *

The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

STATEMENT

The essential facts are undisputed. Respondent Mary Carter Paint Company ("Mary Carter") manufactures paint and sells it to the public through more than 500 retail outlets (which are wholly-owned) and through franchised dealers located in 28 eastern and southern States (RX 2, pp. 3, 6).² In 1960 its sales totaled \$12,000,000 (R. 20).

From the time it began business in 1951, Mary Carter, as an established and permanent policy, has advertised that for every can of paint purchased it will give the purchaser a "free" can of equal quality and quantity (RX 2, p. 3; R. 124). Examples of such advertising are:

"Buy one get one free" (RX 23; CX 29)

"Every 2nd can Free of extra cost" (CX 2, CX 8)

"Buy only half the Paint you need" (CX 5)

"Acrylic Rol-Latex * * * \$2.25 qt. \$6.98 gal. every 2nd can free" (CX 41, CX 45)

While Mary Carter sells different types of paint, much of it is advertised at \$2.25 per quart or \$6.98 per gallon (*e.g.* CX 45, CX 47, CX 49). A purchaser thus receives two quarts for \$2.25 or two gallons for \$6.98.

The policy of the company is to charge the advertised price whether or not the purchaser takes the "free" can (R. 22-23, 96, 206-207). One who bought

² "RX" refers to respondents' exhibits and "CX" to Commission exhibits. The exhibits are contained in the "Joint Record Exhibits" compiled for the court below in a separate volume from the "Printed Record."

a gallon can and rejected the accompanying free gallon would have to pay \$6.98 but if he really wanted only one gallon, he could purchase two quart cans at \$4.50 and receive two quarts "free," thus paying \$4.50 for a gallon. The record indicates that a purchaser paying \$4.50 for four quarts sometimes was given a gallon can (R. 46, 106; CX 67, pp. 50-51).

On February 15, 1961, the Federal Trade Commission issued a complaint against Mary Carter charging that its advertising was false and misleading, in violation of Section 5 of the Federal Trade Commission Act (R. 6, 10-11).³ After full administrative proceedings the Commission (Commissioner Elman dissenting) held that Mary Carter had engaged in misleading advertising, and issued a cease-and-desist order (R. 53-54, 56-91). The Commission stated that although there had been a "few isolated instances" where a purchaser paid the unit price but took only one can of paint, Mary Carter "usually and customarily" had "sold two cans of paint for the so-called single can price"; and it agreed with the examiner's finding "that the amount designated in respondents' advertising as the price for a can of Mary Carter paint is not the usual and regular price per single can but the usual and regular price for two cans" (R. 65; see R. 52, 58). The Commission further held (R. 60-64, 66-67) that neither its rules governing the use of the word "free" in advertising

³ The complaint also named as respondents three individuals who were at the time, or had been, officers of Mary Carter. The complaint was dismissed against two of them (R. 32-33, 53-54).

nor Guide V of its Guides Against Deceptive Pricing, in effect at that time, justified Mary Carter's advertising. See discussion *infra*, pp. 8-14.⁴

The Commission's order directed Mary Carter to cease and desist from representing (a) that the price of a product is "respondents' customary and usual retail price" when that price is greater than the price "at which such merchandise is customarily and usually sold by respondents at retail"; and (b) that an article is being given free "or without cost or charge, when such is not the fact" (R. 53).

The court of appeals set aside the Commission's order and ordered the complaint dismissed. (App. A, *infra*, pp. 16-29.) The court, "adopt[ing] and approv[ing] the reasoning and the result" in Commissioner Elman's dissenting opinion (*id.*, p. 23), held that the Commission had failed to explain what was unfair or deceptive about Mary Carter's advertising, and had departed from its established rules governing the use of the word "free" in advertising. The court further ruled that the cease-and-desist order was impermissibly vague.

REASONS FOR GRANTING THE WRIT

This case presents an important question involving the authority of the Federal Trade Commission to prohibit the misleading use of the word "free" in the advertising of goods for sale. Slogans such as "buy

⁴ The Commission also upheld the examiner's exclusion of evidence offered by Mary Carter to show the quality of its paint, as irrelevant to the issue whether its advertising was deceptive (R. 67-68).

"one-get one free" are commonplace in modern advertising. The Commission here held that a firm which always sells its product on such a "two-for-one" basis is not offering the second unit "free," but is selling two units at the stated price; and that its use of the word "free" therefore is an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act. The court of appeals' reversal of that holding casts serious doubt upon the Commission's authority to prohibit such misleading advertising at all, and at the very least, engenders considerable uncertainty in this important area of the Commission's work. The problem is particularly acute because the Commission has at least 15 pending investigations, involving various industries, into advertising which states that the seller is giving a "free" item with the purchase of other items at a designated price, whereas in fact the "free" and the other items always are sold together in a single package at that price. In addition, the decision, by giving a "green light" to Mary Carter's practices, is likely to spawn further misleading advertising of this character. A court of appeals decision which portends such serious consequences and which, we submit, is erroneous warrants review by this Court.

1. The Commission correctly concluded that Mary Carter engaged in false and deceptive acts and practices by regularly and customarily advertising that if one gallon of paint is purchased at \$6.98, another gallon is supplied "free." The necessary implication of this advertising is that the customary price of the

paint is \$6.98 per gallon, and it induces the customer to believe that Mary Carter is offering him two cans of paint for a price at which it would ordinarily sell only one. The advertising is pointless if that is not the effect. In fact, this representation is false, since Mary Carter admittedly always sold two gallons for \$6.98; and its falsity is not disproved because, if someone wanted a gallon of paint *in a single can*, he would ordinarily have to pay \$6.98 whether or not he also accepted the second can.⁵ In truth, Mary Carter is not selling paint at \$6.98 a gallon and giving a second can free; it is selling a package of two gallons for \$6.98. The company's initial decision to sell on that basis necessarily reflected its belief that it could profitably sell paint at \$3.49 a gallon. While sophisticated purchasers who read Mary Carter's advertisements might realize that this "two-for-one" selling was the company's regular policy, "[t]he law is not made for the experts but to protect the public,—that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions" (*Aronberg v. Federal Trade Commission*, 132 F. 2d 165, 167 (C.A. 7)). It is the misrepresentation that \$6.98 was the usual price for a gallon of paint that constitutes the unfair and deceptive practice.

⁵ If he wanted only one gallon of paint, he would ask for four quart cans, paying \$4.50 instead of \$6.98 (R. 96-97). He sometimes might be given the four quarts in a gallon can. See *supra*, p. 4.

The Commission's ruling accords with *Federal Trade Commission v. Standard Education Society*, 302 U.S. 112. In that case the company made a practice of representing that the purchaser of a supplement to the encyclopedia would receive the encyclopedia "free," whereas in fact the price covered both the supplement and the encyclopedia. The court of appeals struck down the finding that the representation violated the Act, on the ground that a purchaser of both would be unlikely "to be misled by the mere statement that the first are given away, and that he is paying only for the second. * * * Such trivial niceties are too impalpable for practical affairs, they are will-o'-the-wisps, which divert attention from substantial evils." *Federal Trade Commission v. Standard Education Society*, 86 F. 2d 692, 696 (C.A. 2). This Court reversed that holding, stating (302 U.S. at 116):

The fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced. * * *

By the same reasoning, Mary Carter engaged in false and deceptive advertising when it represented that one can of paint is "given away, and that [the buyer] is paying only for the second."

2. Fairly read, the Commission's decisions since *Walter J. Black, Inc.*, 50 F.T.C. 225, upon the use of the word "free" in advertising, have followed a consistent course which has apparently been under-

stood by most of the business community. The decision below, we respectfully submit, is a source of confusion.

In *Walter J. Black, Inc.*, the Commission reviewed the entire problem of the use of the word "free" in advertising, and took as its major premise the following paragraph from the government's brief in this Court in *Federal Trade Commission v. Standard Education Society*, *supra* 50 F.T.C. at 234-235:

When such an offer of a gift is made, the customer understands from the use of the word "gift" that an article is to be received without any payment being made for it. If he is told that it is to be received "Free of Charge" if another article is purchased, the word "free" causes him to understand that he is paying nothing for that article and *only the usual price for the other*. If this is not the true situation, there is no free offer and a customer is misled by the representation that he is to be given something free of charge. [Emphasis added.]

The Commission went on to say that the "essence of this opinion is that there must be truth in advertising to support the use of the word 'free.' If an advertiser either lies as to the facts or tells only part of the truth in his advertising, and such lies or omissions have the tendency or capacity to mislead or deceive the public, this Commission * * * must inhibit such use of the word 'free' in advertising."

The Commission then addressed itself to circumstances in which the use of the word "free" would

be unfair: (a) where all the conditions for receipt of the free article were not clearly and conspicuously explained or (b) when the offerer—

either (1) increases the ordinary and usual price; or (2) reduces the quality; or (3) reduces the quantity or size of such article of merchandise.*

The quoted passage relates to a situation in which the seller has been marketing an article at a regular price and wishes to offer a "free" bonus. That was the situation in the case before the Commission, for Walter J. Black, Inc. was offering new members of the book club "free" books if they would pay the same price at which the purchased books were sold to old members. Furthermore, the price paid for the purchased books was no higher than the established price for those books in book stores. The same was true in *Book-of-the-Month Club, Inc.*, 50 F.T.C. 778.

Conversely, the passage quoted from *Black* obviously was not directed to the situation in which a seller normally sells his products in pairs. If the seller does not have an ordinary and usual price for a single unit, it is just as deceptive for him to advertise "Buy one for \$2, and get one free" as it would be for him to raise an established regular price from \$1 to \$2 and then make the same claim. In each case he would be impliedly representing that the advertised price of the single unit was its regular price,

* Commissioner Elman's dissenting opinion (R. 79) distorts the above test by omitting all reference to "the ordinary and usual price," which is the key to all the pronouncements on the subject.

whereas in fact it was not; that the buyer was getting something he would ordinarily have to pay for; and that the extra was, in that sense, free. Since in the present case Mary Carter's implied representations to that effect are false, Mary Carter's practice violates the clearly-stated general principle of the *Black* opinion—"that there must be truth in advertising to support the use of the word 'free.'"

If there could be any doubt upon this point, it was put to rest by Guide V of the Commission's Guides Against Deceptive Pricing. The Guide, adopted in October 1958 and still in effect at the time of the Commission's opinion, provided (R. 63):

No statement or representation of an offer to sell two articles for the price of one, or phrase of similar import, should be used unless the sales price for the two articles is the advertiser's usual and customary retail price for the single article in the recent, regular course of his business.¹

¹ Guide IV of the Commission's current Guides Against Deceptive Pricing, which became effective January 8, 1964, provides:

"Frequently, advertisers choose to offer bargains in the form of additional merchandise to be given a customer on the condition that he purchase a particular article at a price usually offered by the advertiser. The forms which such offers may take are numerous and varied, yet all have essentially the same purpose and effect. Representative of the language frequently employed in such offers are 'Free,' 'Buy One—Get One Free,' '2-For-1 Sale,' 'Half Price Sale,' '1¢ Sale,' '50% Off,' etc. Literally, of course, the seller is not offering anything 'free' (i.e., an unconditional gift), or $\frac{1}{2}$ free, or for only 1¢, when he makes such an offer, since the purchaser is required to purchase an article in order to receive the 'free' or '1¢' item. It is

Taken by itself this statement unequivocally condemns Mary Carter's advertising. Surely it will not be claimed that the fact that Mary Carter will sell a gallon of paint in a single can for \$6.98, if the customer refuses to take the second gallon, is enough to make \$6.98 its "usual and customary" retail price for a gallon of paint, when in fact every customer has always been able to get two gallons for that price or a single gallon in four quart cans for \$4.50.

Guide V is accompanied by the following note:

(Note: Where the one responsible for a "two for the price of one" claim has not previously sold the article and/or articles, the propriety of the advertised price for the two articles is determined by the usual and customary retail price of the single article in the trade area, or areas, where the claim is made.)

The note is inapplicable to respondents' practice for two reasons. First, it has no application to a new,

important, therefore, that where such a form of offer is used, care be taken not to mislead the customer.

"Where the seller, in making such an offer, increases his regular price of the article required to be bought, or decreases the quantity and quality of that article, or otherwise attaches strings (other than the basic condition that the article be purchased in order for the purchaser to be entitled to the 'free' or '1¢ additional merchandise) to the offer, the consumer may be deceived.

"Accordingly, whenever a 'free,' '2-for-1,' 'half price sale,' '1¢ sale,' '50% off' or similar type of offer is made, all terms and conditions of the offer should be made clear at the outset."

This Guide, like the prior Guide V discussed in the text, rests upon the basic premise that it is deceptive to misrepresent, explicitly or impliedly, that the selling price in connection with which the "free" item is offered is the "price usually offered by the advertiser."

non-fungible product such as paint, where there are wide variations in the products offered by different sellers and the newcomer cannot be said to be selling the article or articles at the "customary retail price" at which the article was sold by others. The note is directed to situations in which the newcomer offers a specific product that he has not sold before but that others have sold, as would happen if a filling station were to commence handling a brand of tires it had not theretofore carried, although they were sold by others. In such a case the price charged by other sellers of the brand might be fairly used to determine the validity of the new seller's "two for one" offer.

Second, the note is addressed only to introductory offers by one breaking into the market. Remembering that it is a note and subordinate to the Guide itself, it cannot fairly be supposed that the Commission intended to authorize sellers to engage in Mary Carter's practice of representing that it was giving two articles for the price at which it usually sold one whereas in fact it had, and would always sell the two for the price of one. So read, the subordinate note would overturn the Guide itself.

Finally, we should point out that even if the note to Guide V were intended to read on Mary Carters' practices, that interpretation would not justify the decision of the court below ordering dismissal of the complaint. At worst, the case should have been remanded to the Commission to hear the proffered testimony upon whether Mary Carter's prices were in fact "the usual and customary retail price" for paint

of similar qualities. The burden would be on respondents to prove real comparability.

In sum, the net effect of the Commission's decisions beginning with *Walter J. Black, Inc.* and extending through the present case has been to permit the use of the word "free" where all the conditions of the offer were clearly and conspicuously explained, and where the "free" article was given on some extraordinary occasion along with the purchase of other articles at the usual price. That is the essential characteristic of the Book Club advertising, penny sales, and similar practices mentioned by the court below. In the light of commercial practice, such advertising could well be regarded as within a widely understood meaning of the adjective "free." There is no suggestion, however, in any of the opinions that the aim of the Commission was to permit a seller regularly and consistently to charge a usual price for the combined group of articles and then advertise that it was charging for some and giving away others "free."

The Commission does not intend to modify *Walter J. Black* and made no modification in the present case.*

* Commissioner Elman's dissenting opinion and the respondents have placed great emphasis upon a sentence in the Commission's opinion reading (R. 67)—

"The cost of the second can of paint was included in the price paid by the purchaser, and this second can, therefore, was not given as a gift or gratuity or free of charge to the petitioner."

But that sentence must be read in conjunction with the other two sentences in the same paragraph which emphasize that the Commission is speaking only of a case in which the "free" can is not given as something extra or free of charge with a purchase at the "usual and regular" price, because there was no usual and regular price for a single can.

CONCLUSION

The petition for a writ of certiorari should be granted."

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

JAMES McI. HENDERSON,
*General Counsel,
Federal Trade Commission.*

OCTOBER 1964.

"If the Court grants the petition and upholds the Commission's position on the merits, the Commission believes that it would be appropriate to remand the case to it for clarification of its order.

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APPENDIX A

In the United States Court of Appeals for the Fifth
Circuit

No. 19982

MARY CARTER PAINT CO., A CORPORATION, JOHN C.
MILLER AND I. G. DAVIS, JR., AS OFFICERS OF SAID
CORPORATION, AND ROBERT VAN WORM, JR., PETI-
TIONERS

versus

FEDERAL TRADE COMMISSION, RESPONDENT

*Petition for Review of an Order of the Federal Trade
Commission*

(June 19, 1964.)

Before HUTCHESON and BROWN, Circuit Judges,
and CHRISTENBERRY, District Judge.

HUTCHESON, Circuit Judge: This case is before the court on a petition to review and set aside a Federal Trade Commission order directing petitioners to cease and desist from engaging in certain unfair and deceptive practices and unfair methods of competition in connection with the interstate sale of paint.

The Commission's complaint charged that petitioners, in connection with the interstate sale of paint, had published advertisements which falsely represented "that the usual and customary retail price of each can * * * is the price designated in the advertisement; that this advertised price is a factory price; and that if one can * * * is purchased at the

advertised price, a second can will be given 'free' * * *. In their answer, petitioners admitted the publication of the advertisements, but denied the misrepresentations alleged.

The undisputed facts as developed at the hearings before a hearing examiner of the Commission are set out in the margin.¹

¹ As pertinent, these are the facts:

Mary Carter Paint Co. is engaged in the business of manufacturing, selling, and distributing paint under the trade name of "Mary Carter". At the time of the hearings, the company distributed its paints in more than 27 states of the United States through over 500 retail outlets, including both company stores and franchise dealers. Although still a small company in the paint industry (its share of national paint sales is under one percent), the company has increased its sales from one million dollars in 1955 to twelve million dollars in 1960, a growth achieved by increasing the number of retail outlets and building the repeat business of satisfied customers.

The basic business policy of Mary Carter, consistently followed over the past ten years, has been to manufacture and sell paint of high quality at a net cost to the consumer of half the amount he would pay for paint of comparable quality manufactured by leading national brand companies. This policy of giving "double value" is carried out in a merchandising practice of pricing a can of Mary Carter paint at a price comparable to the price of national brand paints of comparable quality, and advertising and giving the purchaser a second can free. Thus, typical Mary Carter advertising in newspapers, magazines, radio, television, store signs, lithographed can tops, and truck sides, states: "Buy One, Get One Free"; "Every Second Can Free of Extra Cost"; "Every Second Can Free".

Mary Carter's merchandising policy and the reason for it are specifically stated in advertisements which explain that Mary Carter paint is "quality priced" and that the company will not "second rate" its paint with a low-price tag—a point of particular importance in a market in which the leading paint manufacturers have combined in a sustained publicity campaign to inculcate a public psychology equating quality with price. [Evidence on this latter point was excluded below, and

After hearing the evidence, the hearing examiner issued his decision wherein he found that petitioners had not misrepresented that their advertised price was a factory price, but had misrepresented the usual and regular price of their paint and had falsely represented that a second can was given free with every can purchased. Accordingly, he issued an order to cease and desist, designed to prohibit the practices found to be violations of the Federal Trade Commission Act.

On review, the Commission accepted the examiner's holding that Mary Carter's advertising was not per-

the petitioner here urges that such exclusion was erroneous.]

The quality of Mary Carter paint is not questioned. Indeed, at the hearing, Commission counsel contended that the quality of Mary Carter paint was not an issue, and the hearing examiner ruled that the evidence offered on the subject by Mary Carter was immaterial. The Commission has upheld that ruling. The evidence was taken for reporting, however, and both the evidence and the examiner's report of the evidence establish that Mary Carter paints are as good as, or superior to, paints marketed under leading national brand names at prices comparable to the single can price of Mary Carter paints. [The exclusion of this evidence constitutes one of petitioners' exceptions to the decision below.]

In accordance with Mary Carter's consistent merchandising practice, the single can price of its paint is the advertised price for a single can and the only price at which Mary Carter paint can be purchased, the purchaser being entitled to receive without extra cost a second can of the same kind of paint or of any other similarly or lower priced Mary Carter paint. Naturally, the purchaser will usually take the second can, but this is optional with him; at times he takes only the single can, and the price paid is the same single can price.

There was no evidence, at the hearing, of consumer complaints or of any deception of Mary Carter customers. The extent of consumer satisfaction with Mary Carter paints and with the value offered and given is indicated, however, by the company's increased sales and, particularly, its repeat-customer sales.

missible because the "free" second can of paint was not a gift or gratuity, though the Commission felt obliged to state in its decision that it did not thoroughly understand the hearing examiner's reasoning on this point, and in a detailed opinion² modified, and as modified adopted as its own, the initial decision and the order to cease and desist contained therein. Commission[er] Elman filed a dissenting opinion.

It is the contention of petitioners: that the decision of the Commission is wholly unsupported by and not in accordance with the probative and substantial evidence and the law of the case; that on the one material issue of whether and how the advertising is misleading or deceptive there is no supporting finding; and that the decision of the Commission is arbitrary and capricious and not in accordance with law. Petitioners also contend that there were substantial errors in the exclusion of material evidence and that the order entered is too vague and imprecise to be meaningful, and that all of these are grounds for review and reversal by this court under the provisions of the Administrative Procedure Act, 5 U.S.C. Secs. 1006-9.

As to the order³ itself, it is petitioners' contention that it is no more than a generality of legal state-

²*In the Matter of Mary Carter Paint Co., Inc. et al.* * * * FTC * * * (628-62).

³The order entered would prohibit Mary Carter from representing "directly or by implication":

"(a) That any amount is [its] customary and usual retail price of any merchandise when said amount is in excess of the price at which such merchandise is customarily and usually sold by [it] at retail in the recent and regular course of business;

"(b) That any article of merchandise is being given free or as a gift or without cost or charge, when such is not the fact";

ment which lacks any precision of meaning adequate to satisfy the requirement of clarity and applicability which the Supreme Court has said is the essence of a Commission order. *F.T.C. v. Henry Broch, Inc.*, 368 U.S. 360. For the reasons and upon the considerations hereafter stated, we agree.

The complaint and opinion of the Commission, Commissioner Elman dissenting, is that the second can is not "free" because it is not a "gratuity", that is the purchaser must buy one can to get the second can free, hence the cost of the second can is included in the price of the first can and the price paid is therefore the price of two cans rather than one can; and that it is misleading or deceptive to advertise that the second can is "free". The case, therefore, turns on and revolves entirely around Mary Carter's use of the word "free" in its advertising. There is no question or issue as to the quality of Mary Carter paint or as to the double value which it gives the public. The claim of the Commission is, however, that there is something misleading or deceptive in Mary Carter's expressing and advertising the bargain given in the terms of every second can "free".

The petitioners insist: that the opinion of the Commission is a mere quibble and in addition it is contrary to its established and long time rulings; that in *Matter of Walter J. Black*, 50 F.T.C. 225 (1953) and *Matter of Book-of-the-Month Club*, 50 F.T.C. 778 (1953), the Commission held that just such a bargain as Mary Carter gives can be expressed and advertised in the terms of a second article "free" with the purchase of one article; and that the Commission enunciated that rule after the most careful consideration and rejection of the argument which it now advances, that the second article could not be considered "free" because acquisition of the second ar-

ticle required the purchase of an article and hence there was no gratuity in the giving of the second article. In short, the transaction is the same as the well-nigh universal one cent sale practice where the merchants advertise that if you buy one article you can get another of the same article for one cent.

The majority opinion of the Commission states that the facts in this case are distinguishable from the facts in the *Black* and the *Book-of-the-Month* cases. Petitioner, however, and we, as the reviewing court, are in the fortunate situation in this case that Commissioner Elman, speaking not as the scribes and pharisees and the bureaucrats do, but as one having authority, has clearly, vigorously and incontrovertibly pointed out in his dissenting opinion the fallacious and quibbling nature of the majority's effort to support its position and to distinguish the cited cases.

Further, Commissioner Elman rightly noted, as "perhaps the most serious deficiency in the majority opinion", that "nowhere does the Commission explain what was 'unfair or deceptive' about what Mary Carter did"; and finally Commissioner Elman found the order issued by the Commission so "indefensibly vague" and "puzzling" that he did not know how respondents could comply with it. It should be added that Commissioner Elman also aptly and devastatingly observed, "As a result, uncertainty and confusion are being introduced, needlessly and unsettlingly, into an area of business activity where businessmen and the bar have long and correctly regarded the Commission's position as definite and clear".

Contrary to the tone and tenor of most dissenting opinions, Commissioner Elman's opinion, instead of being a polemic directed at sustaining his own con-

trary view, is devoted to a careful, thoughtful and positive demonstration that the Commission, in reaching its conclusion, had devoted its efforts to tithing mint, anise and cummin, while neglecting and disregarding the weightier things of the law.

We find ourselves in agreement with Commissioner Elman's dissenting opinion: that the opinion of the Commission is completely erroneous; and that its order is lacking in the precision and definiteness which the statute requires of such an order as this. We reject, as Commissioner Elman does, the Commission's opinion: that Mary Carter's advertising is misleading because "The second can of paint was not, and is not now free"; that it was not, and is not now given without cost to the retail purchaser since the purchaser paid the advertised price; and that this was, and is now, the usual and regular retail price at which two cans of Mary Carter paint were ordinarily sold.

In short, we agree with Commissioner Elman's demonstration that in sustaining the complaint in this case and holding that Mary Carter's advertising is misleading and deceptive in the respects alleged, it is clear that the Commission has departed from its established rules, on which Mary Carter had "every right to rely", and has reverted to its discarded reasoning in the first *Book-of-the-Month Club* case. "This", as Commissioner Elman observes, "it has not done forthrightly", however, but by purporting to find that this case is "distinguishable" from the *Black* case, which it purports to still recognize as law. We agree with Commissioner Elman that the cases are "indistinguishable" and the decision of the Commission to the contrary is unsupported in law.

The brief of petitioners has presented in a thoroughgoing and lawyer-like way petitioners' po-

sition. We are spared, however, the necessity of more thoroughly presenting their views and arguments by the fact that we find it sufficient to say that we adopt and approve the reasoning and the result in Commissioner Elman's dissenting opinion,* and particularly this concluding statement from it:

This brings me to what is perhaps the most serious deficiency in the majority opinion. The duty of the Commission in this case was to determine whether Mary Carter had violated Sec. 5 of the Federal Trade Commission Act by engaging in any "unfair or deceptive acts or practices". Yet nowhere does the Commission explain what was "unfair or deceptive" about what Mary Carter did. The word "deceptive" appears in the Commission's opinion on page 2 in a description of the allegations of the complaint and again on page 10 in the observation that a good motive cannot justify a deceptive practice. But we are never informed as to who is, or might be, misled by Mary Carter's "Buy one and get one free" offer, or as to how that deception might be brought about.

Finally, Commissioner Elman noted* that the Commission's order to cease and desist was "indefensibly

**In the Matter of Mary Carter Paint Co. Inc. etc.*—FTC at page —.

*"The Commission's order prohibits respondents from representing:

"(a) That any amount is respondents' customary and usual retail price of any merchandise when said amount is in excess of the price at which such merchandise is customarily and usually sold by respondents at retail in the recent and regular course of business'

'(b) That any article or merchandise is being given free or as a gift, or without cost or charge, when such is not the fact * * *'

"A reading of the order invites this question: What must respondents stop doing that they are now doing? Paragraph

vague", particularly in the light of the Supreme Court's recent call for Commission orders "sufficiently clear and precise to avoid raising serious questions as to their meaning and application".

It will be noted that throughout the briefs and arguments of the parties as to the error of the Commission, there is no claim that the Commission's error is in

'(a)' declares that they may not call any amount their usual and customary price if it is in excess of their usual and customary price in the recent, regular course of business. Obviously, this has as little to do with the case as Guide V of the Guides Against Deceptive Pricing. Respondents have never sought to represent their 'recent' prices; they advertise only their current prices. As it happens, however, their current prices are the same as their recent prices. Whether regarded as a one-can or two-can price, respondents' advertised price of \$2.25 per quart, for example, is their 'usual and customary retail price' NOW, and it is not in excess of \$2.25 per quart, which is 'the price at which such merchandise is customarily and usually sold by respondents at retail in the recent and regular course of business'. Does this mean that paragraph '(a)' has no effect at all on respondents' advertising practice? Surely not, or the Commission would not issue it. But what effect does it really have, and how are respondents to comply with it? I confess I do not know.

"Paragraph '(b)' is almost as puzzling. Presumably, it is intended to require respondents to cease advertising 'Buy 1 and get 1 Free'. But this cannot be deduced from anything to be found in the terms of the order. As the Commission's own troubles with the problem show, the definition of 'free' merchandise is no easy matter. Yet respondents are ordered, on pain of heavy penalties, to cease and desist from describing merchandise as free 'when such is not the fact'. Surely this provision, like paragraph '(a)', is indefensibly vague, particularly in light of the Supreme Court's recent call for Commission orders 'sufficiently clear and precise to avoid raising serious questions as to their meaning and application.' *Federal Trade Commission v. Henry Broch & Co.*, 368 U.S. 360, 368 (1962)."

its findings of fact. Indeed, there could not be because the facts as to what the appellants did were undisputed. There was no evidence to the contrary of what they proved that they did, so that we are not confronted here with any question of the presumption attending the Commission's findings of fact. The evidence presented no conflict which would form the basis of such a finding, and the sole question presented here is a question of *law for the court*, whether the Commission's conclusions from the undisputed facts are legally supportable.

In his annual message to Congress, January, 1936, the President, referring to the establishment of administrative bodies, declared:

* * * in thirty-four months we have built up new instruments of public power. In the hands of a people's Government this power is wholesome and proper. But in the hands of political puppets of an economic autocracy such power would provide shackles for the liberties of the people.

Some ten years later, the President transmitted to Congress, with his full endorsement and the statement that it was a great document of permanent importance, the report of his Committee on Administrative Management, which, because of the growth and intensification of administrative legislation of private enterprise and other phases of American life, he had created, appointing to it wise and earnest men. In transmitting the report he took occasion to say that the practice of creating administrative agencies, which perform administrative work in addition to judicial work, threatens to develop a fourth branch

* The Public Papers and Addresses of Franklin D. Roosevelt, Vol. 5, p. 16.

of the government for which there is no sanction in the Constitution.¹

To this the Committee added:

There is a conflict of principle involved in their make-up and functions. * * * They are vested with duties of administration * * * and at the same time they are given important judicial work * * *. The evils resulting from this confusion of principles are insidious and far reaching. * * * Pressures and influences properly enough directed toward officers responsible for formulating and administering policies constitute an unwholesome atmosphere in which to adjudicate private rights.

In June, 1946, the Congress enacted, and on June 11, the President approved the Administrative Procedure Act,² and thus there had at last come about an Administro-Judicial Process established by legislative sanction and judicial approval.³

¹Cf. "All three existing arms of government being found inadequate to achieve the social purpose aimed at, a new type of body called a Commission, a government in miniature, is set up." John Willis, University of Toronto Law School, Vol. 4, p. 60, Administrative Law, Selected Essays on Constitutional Law, Foundation Press, 1938.

²"An act to improve the administration of justice by prescribing fair administrative procedure." Chap. 324, Public Law 404, Laws of the 79th Congress, 2nd Session 1946.

³"An administro-judicial process, beginning with administrative adjudication of the facts and ending with a judicial adjudication of the law, both as completely aspects of one adjudicative process as are the adjudication of the facts by trial judge or jury and the adjudication of the law on appeal." Judging as Administration, Administration as Judging, Texas Law Review, Vol. 21, Nov., 1942.

"Under such statutes this court does not function as a tribunal exterior to the statutory administrative scheme, whose jurisdiction is invoked on constitutional grounds, to protect the applicant against the failure of the statute to provide due

Because, as we have held above, the Commission's decision and order are not in accordance with law, its decision and order are **REVERSED** and the Commission is directed to enter an order dismissing the complaint.

BROWN, Circuit Judge, concurring specially:

I am in full agreement with the Court's result and with much of its opinion written by my distinguished Brother Hutcheson. With no purpose to prepare a polemic or tithe "mint, anise and cummin," I would speak—"not as the scribes and Pharisees and the bureaucrats do," *cf. Thompson v. United States*, 5 Cir., 1964, * * * F. 2d * * * [No. 20214, May 27, 1964] (dissenting opinion)—but as a special concurring Judge should, a few brief words to indicate the views which lead me to decision.

At the outset I am not troubled about the so-called undemonstrated deception. One thing clear is that Mary Carter's paint is not really sold at any of the advertised prices. Thus, the price of \$6.98 for the first gallon, the second one "free" is not the price at all for one gallon. Nor is it \$3.49 (one-half of \$6.98 for two gallons. Rather, it is \$4.50, represented by the cost of two-one quarts (\$2.25), getting for each, another "free" quart. For those who read and buy paint while running, I would suppose that Government might deem it appropriate to demand that at least one of the advertised prices be the correct one.

But at issue here is something more fundamental than house paint, bargains, or the American habit of self-delusion on "free" articles.

process. It functions as the tribunal of last resort, set up in the statute itself, for the correction of errors of law committed, and not corrected, in the course of the administrative procedures." *Leebern v. United States*, 124 F(2) 507. *Cf. U.S. v. Morgan*, 307 U.S. at p. 191.

Our complex society now demands administrative agencies. The variety of problems dealt with make absolute consistency, perfect symmetry, impossible. And the law reflects its good sense by not exacting it. But law does not permit an agency to grant to one person the right to do that which it denies to another similarly situated. There may not be a rule for Monday, another for Tuesday, a rule for general application, but denied outright in a specific case.

That is what the Commission has done here. The precise action done here is permitted by *Black*, 50 F.T.C. 225 (1953). And even more unequivocal is the "Free Rule" [50 F.T.C. 235-236] patterned on it, but which has the positiveness of a rule, not a judicial-like opinion expounding a principle. These offers meet fully, honestly, and in good faith the requirement of Paragraph (2) found in each. Although Mary Carter's offer of the "free paint" is contingent on the purchase of a quart or a gallon, Mary Carter does not either (1) increase "the ordinary and usual price" or (2) reduce "the quality"; or (3) reduce "the quantity or size of the article of merchandise" which the customer is required to purchase.

Nevertheless, the Commission now holds that Mary Carter may not do what the Commission's two pronouncements clearly permit.

I am not arguing for *Black* in perpetuity. It may be bad or undesirable. The "Free Rule," emphatic as it is, may be worse. If so, the Commission should so declare. But so long as that is the rule, the Commission may not nullify it by individual decision while ostensibly holding it out as the standard for others.

With *Black* and the "Free Rule" not yet repudiated, Mary Carter is the victim of individualized

discrimination. So long as *Black* stands, so long as the "Free Rule" stands, paragraph (2) must be fairly applied.

As I did with the Interstate Commerce Commission in *Yellow Transit Freight Lines, Inc. v. United States*, N.D. Tex., 1963, (3-Judge), 221 F. Supp. 465, 469-71 (concurring opinion), I think the Federal Trade Commission has to make up its mind.

October Term, 1963

No. 10982

MARY CARTER PAINT CO., A CORPORATION, JOHN C. MILLER AND I. G. DAVIS, JR., AS OFFICERS OF SAID CORPORATION, AND ROBERT VAN WOEY, JR., PETITIONERS

FEDERAL TRADE COMMISSION, RESPONDENT

Petition for Review of an Order of the Federal Trade Commission

Before HUTCHESON and THORP, Circuit Judges, and CHRISTENSEN, District Judge.

JUDGMENT

This cause came on to be heard on the petition of Mary Carter Paint Co., a corporation, John C. Miller and I. G. Davis, Jr., as officers of said corporation, and Robert Van Woey, Jr., for review of an order of the Federal Trade Commission and was argued by counsel:

On consideration whereof, it is now hereby ordered, adjudged, and decreed by this Court that the decision and order of the Federal Trade Commission in this cause be, and the same are hereby, reversed and the

discrimination. So long as that stands, so long as the "Free Rule" stands, paragraph (2) must be fairly applied.

As I did with the Federal Trade Commission in *Yellow Freight Lines, Inc. v. United States, 137 F.2d 1008 (3-10-43)*, 221 F. Supp. 465.

APPENDIX B
UNITED STATES COURT OF APPEALS FOR THE FIFTH
CIRCUIT

October Term, 1963

No. 19982

MARY CARTER PAINT CO., A CORPORATION, JOHN C. MILLER AND I. G. DAVIS, JR., AS OFFICERS OF SAID CORPORATION, AND ROBERT VAN WORP, JR., PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

Petition for Review of an Order of the Federal Trade Commission

Before HUTCHESON and BROWN, Circuit Judges, and CHRISTENBERRY, District Judge.

JUDGMENT

This cause came on to be heard on the petition of Mary Carter Paint Co., a corporation, John C. Miller and I. G. Davis, Jr., as officers of said corporation, and Robert Van Worp, Jr., for review of an order of the Federal Trade Commission, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged, and decreed by this Court that the decision and order of the Federal Trade Commission in this cause be, and the same are hereby, reversed and the

Commission is directed to enter an order dismissing the complaint.

"Brown, Circuit Judge, Concurs Specially."

June 19, 1964.

Issued as Mandate: July 13, 1964.

Supreme Court of the United States

October Term, 1964

SPECIAL TERM: LEXINGTON, VIRGINIA

WILLIAM CLAYTON PARKER, JR., JOHN D. HENSON, L. G.
DAVIS, JR., AND RUSSELL VAN WORM, JR.

PRINTER FOR RESPONDENT IN OPPOSITION
TO PETITION FOR WRIT OF HABEAS CORPUS

W. CLAYTON PARKER, JR.
Attorney for Respondent
87 Wall Street
New York 6, N. Y.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1964

FEDERAL TRADE COMMISSION, PETITIONER

v.

MARY CARTER PAINT CO., JOHN C. MILLER, I. G.
DAVIS, JR., AND ROBERT VAN WORP, JR.

**BRIEF FOR RESPONDENT IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

DAVID W. PECK,
Attorney for Respondent,
48 Wall Street,
New York 5, N. Y.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1964

No. —

FEDERAL TRADE COMMISSION, PETITIONER

v.

MARY CARTER PAINT CO., JOHN C. MILLER, I. G.
DAVIS, JR., AND ROBERT VAN WORP, JR.

**BRIEF FOR RESPONDENT IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

Opinions Below

The opinion of the Court of Appeals (App. A to petition, 16-29) is reported at 333 F.2d 654. The opinion of the Federal Trade Commission (R. 55-91)* is not yet officially reported.

Jurisdiction

The judgment of the Court of Appeals was entered on June 19, 1964 (App. B, 30-31). On September 17, 1964, Mr. Justice Black extended the time for filing

*"R." refers to the printed record in the Court of Appeals, "Tr." to the stenographic transcript of the hearing before the hearing examiner, "CX" to Commission exhibits and "RX" to respondent's exhibits. References to pages in the petition will be cited as "Pet." and references to pages in the appendix to the petition will be cited as "App."

a petition for a writ of certiorari to and including October 15, 1964, and on October 14, 1964, he further extended the time for filing to and including October 26, 1964. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Statute Involved

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U. S. C. 45, provides in part as follows:

(a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

* * * * *

The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

Question Presented

Whether the Court of Appeals was warranted in holding, upon undisputed facts, that a case of deceptive and misleading advertising had not been established, and that, therefore, the Commission was not justified in issuing a cease and desist order.

Statement

As stated in the petition for a writ (Pet. 3), the essential facts are undisputed. The facts are here

stated as the opinion of the Court of Appeals stated them (App. A 17-18):

"Mary Carter Paint Co. is engaged in the business of manufacturing, selling, and distributing paint under the trade name of 'Mary Carter.' At the time of the hearings, the company distributed its paints in more than 27 states of the United States through over 500 retail outlets, including both company stores and franchise dealers. Although still a small company in the paint industry (its share of national paint sales is under one percent), the company has increased its sales from one million dollars in 1955 to twelve million dollars in 1960, a growth achieved by increasing the number of retail outlets and building the repeat business of satisfied customers.

"The basic business policy of Mary Carter, consistently followed over the past ten years, has been to manufacture and sell paint of high quality at a net cost to the consumer of half the amount he would pay for paint of comparable quality manufactured by leading national brand companies. This policy of giving 'double value' is carried out in a merchandising practice of pricing a can of Mary Carter paint at a price comparable to the price of national brand paints of comparable quality, and advertising and giving the purchaser a second can free. Thus, typical Mary Carter advertising in newspapers, magazines, radio, television, store signs, lithographed can tops, and truck sides, states: 'Buy One, Get One Free'; 'Every Second Can Free of Extra Cost'; 'Every Second Can Free'.

"Mary Carter's merchandising policy and the reason for it are specifically stated in advertisements

which explain that Mary Carter paint is 'quality priced' and that the company will not 'second rate' its paint with a low-price tag—a point of particular importance in a market in which the leading paint manufacturers have combined in a sustained publicity campaign to inculcate a public psychology equating quality with price.

“The quality of Mary Carter paint is not questioned. Indeed, at the hearing, Commission counsel contended that the quality of Mary Carter paint was not an issue, and the hearing examiner ruled that the evidence offered on the subject by Mary Carter was immaterial. The Commission has upheld that ruling. The evidence was taken for reporting, however, and both the evidence and the examiner's report of the evidence establish that Mary Carter paints are as good as, or superior to, paints marketed under leading national brand names at prices comparable to the single can price of Mary Carter paints.

“In accordance with Mary Carter's consistent merchandising practice, the single can price of its paint is the advertised price for a single can and the only price at which Mary Carter paint can be purchased, the purchaser being entitled to receive without extra cost, a second can of the same kind of paint or of any other similarly or lower priced Mary Carter paint. Naturally, the purchaser will usually take the second can, but this is optional with him; at times he takes only the single can, and the price paid is the same single can price.

“There was no evidence, at the hearing, of consumer complaints or of any deception of Mary Carter cus-

tomers. The extent of consumer satisfaction with Mary Carter paints and with the value offered and given is indicated, however, by the company's increased sales and, particularly, its repeat-customer sales."

The complaint of the Commission charged that respondent's use of the word "free" in its advertising was "misleading and deceptive," in that "The second can of paint was not, and is not now, 'free', that is, was not, and is not now, given without cost to the retail purchaser since the purchaser paid the advertised price, which was, and is now, the usual and regular retail selling price for two cans of Mary Carter paint."

Respondent answered and maintained at the hearing, before the Commission, and before the Court, that its advertising was a fair and realistic representation of the bargain which it gave and that its use of the word "free" in its advertising was sanctioned by the Commission's decisions in *Matter of Walter J. Black, Inc.*, 50 F. T. C. 225 (1953) and *Matter of Book-of-the-Month Club*, 50 F. T. C. 778 (1953), and the Commission's "Free Rule" as stated in its Guides Against Deceptive Pricing.

While for a time prior to 1953, the Commission took the position that the word "free" in advertising could not be used unless the free item was given away by the advertiser as a "gift or gratuity" without requiring the purchase of any article or attaching any other condition (*Matter of The Book-of-the-Month Club*, 48 F. T. C. 1297 (1952)), the Commission in 1953 acknowledged that its prior ruling was essentially un-

realistic.* Then, in recognition of the fact that consumers are fully aware of the economics of offers of a "free" article upon the purchase of an article, and that businessmen the country over had been so using the word "free" in their merchandising and advertising for over a hundred years and were entitled to certainty in their knowledge of its propriety, the rule was laid down by the Commission that a second article may be advertised as "free," although the purchase of an article is required in order to get the second article free, provided the price of the first article is the ordinary and usual price of such merchandise and the price is not increased or the quality or quantity reduced as a predicate of offering the second article "free." (*In the Matter of Walter J. Black, Inc.*, 50 F. T. C. 225)**

In giving its rationale for overruling the *Book-of-the-Month Club* decision, the Commission in the *Black* case quoted with approval from a brief which had been filed in behalf of the Commission in the Supreme Court in *FTC v. Standard Education Society*, 302 U. S. 112 (1937), and adopted its language as the reasoning of the Commission (50 F. T. C. at 234):

"It is true that the cost of the premium is borne by the manufacturer or seller, and that this

* The Commission had reasoned in the *Book-of-the-Month Club* case (where "one free volume" was offered with each two volumes purchased) that if the consumer could obtain the free item only upon the condition of purchasing some other article, the item was not literally "free" in accordance with the "definite and absolute meaning" of that word, because the purchase price paid by the consumer for the one article included the cost of the "free" item.

** Black in his "Detective Book Club" offered a volume "Free" with a membership obliging a member to buy four volumes in twelve months.

cost must eventually be recovered in the price of the product sold if the business is to operate at a profit. But if the regular price of the article sold without the premium is the same as the price with the premium the premium does not cost the customer anything. It is FREE TO HIM regardless of whether or not it is ultimately included in the purchase price, and he does not care whether the manufacturer or dealer makes sufficient profit on the sale to cover the cost of the premium, whether the cost is termed as an advertising expense, or whether it causes the manufacturer or dealer to operate at a loss."

The holding of the *Black* decision, followed by a like revision of the order previously entered in the *Book-of-the-Month Club* case (50 F. T. C. 778), was incorporated in the Commission's subsequently promulgated "Free Rule" (Dec. 3, 1953), which established rules governing the use of the word "free" where receipt of the free item was conditioned upon the purchase of another item (R. 59).*

* The Commission's "Free Rule" at the time of the complaint and decision of the Commission read as follows:

"In connection with the sale, offering for sale, or distribution of industry products, it is an unfair trade practice to use the word 'free,' or any other word or words of similar import, in advertisements or in other offers to the public, as descriptive of an article of merchandise, or service, which is not an unconditional gift, under the following circumstances:

"(1) When all the conditions, obligations, or other prerequisites to the receipt and retention of the 'free' article of merchandise or service offered are not clearly and conspicuously set forth at the outset so as to leave no reasonable probability that the terms of the offer will be misunderstood; and, regardless of such disclosure:

"(2) When, with respect to any article of merchandise required to be purchased in order to obtain the 'free' article or

The initial decision of the hearing examiner against respondent in this case went primarily on the ground that Mary Carter's free offer did not meet the Commission's "Free Rule" requirement that the conditions for receipt of the free article be clearly and conspicuously stated (R. 33-39). That conclusion was reached although (a) no such claim had been made in the complaint or suggested at any time during the hearing, and (b) the advertising referred to in the complaint and

service, the offerer (a) increases the ordinary and usual price of such article of merchandise, or (b) reduces its quality, or (c) reduces the quantity or size thereof."

As restated, effective January 8, 1964, the rule reads as follows:

"Frequently, advertisers choose to offer bargains in the form of additional merchandise to be given a customer on the condition that he purchase a particular article at a price usually offered by the advertiser. The forms which such offers may take are numerous and varied, yet all have essentially the same purpose and effect. Representative of the language frequently employed in such offers are 'Free,' 'Buy One—Get One Free,' '2-For-1 Sale,' 'Half Price Sale,' '1¢ Sale,' '50% Off,' etc. Literally, of course, the seller is not offering anything 'free' (i.e., an unconditional gift), or ½ free, or for only 1¢, when he makes such an offer, since the purchaser is required to purchase an article in order to receive the 'free' or '1¢' item. It is important, therefore, that where such a form of offer is used, care be taken not to mislead the customer.

"Where the seller, in making such an offer, increases his regular price of the article required to be bought, or decreases the quantity and quality of that article, or otherwise attaches strings (other than the basic condition that the article be purchased in order for the purchaser to be entitled to the 'free' or '1¢' additional merchandise) to the offer, the consumer may be deceived.

"Accordingly, whenever a 'free,' '2-for-1,' 'half price sale,' '1¢ sale,' '50% off' or similar type of offer is made, all terms and conditions of the offer should be made clear at the outset."

decision as "typical" concededly (in the examiner's own words) "leaves little doubt that payment must be made for the first can" (R. 34). The Commission necessarily rejected the examiner's principal ground of decision (R. 59-60).

The Commission did, however, accept the examiner's holding that Mary Carter's advertising was not permissible because the "free" second can of paint was not a "gift or gratuity," although the Commission felt obliged to state in its decision that it "did not thoroughly understand the hearing examiner's reasoning on this point" (R. 60-65).

At the hearing, the examiner excluded evidence proffered by Mary Carter to show that the quality of its paint was equal to or better than the quality of national brand paints similarly priced per single can. The evidence was excluded upon objection by counsel for the Commission that the quality of Mary Carter paint was not questioned and was not in issue (R. 127, 136). Under FTC Rules of Practice § 4.12(f), the hearing examiner received the evidence, however, for reporting purposes.* Commission counsel made no counter-offer

* The evidence consisted of (a) testimonial and documentary evidence by Alfred Driscoll, a paint testing expert, detailing twenty different tests made under his direction of Mary Carter paints and five competitive brands of paint in five different categories (RX 7-10, 13, 14 for identification; R. 150-69; Tr. 186-237, 239-43); (b) testimonial and documentary evidence of production quality controls maintained and tests made of Mary Carter paint in the regular course of manufacture (RX 15-18, 20 for identification; R. 142-44, 173-79); (c) testimonial and documentary evidence of comprehensive comparative performance tests of Mary Carter paints and leading national brand paints by Mary Carter laboratory technicians (RX 19, 20 for

of proof but availed himself of the privilege of cross-examining the Mary Carter witnesses (R. 158-167, 196-198).

The examiner made findings for reporting purposes with respect to the excluded evidence. The substance of the findings made was that (in absence of evidence litigiously offered in opposition thereto) Mary Carter paint was shown to be "equal to or better than comparable, similarly-priced, top-quality national brand paints" (R. 47).*

The majority of the Commission found the present case "distinguishable" from the *Black* and second *Book-of-the-Month Club* cases in that, as stated, there was no "usual and customary price" established for a gallon or quart of Mary Carter paint because Mary Carter had always sold its paint on the basis of giving a second can to a purchaser who desired it upon the purchase of one can. "Consequently," said the ma-

identification; R. 180-86); (d) testimony of the low percentage of consumer complaints concerning Mary Carter paints (R. 125-26, 179-80); (e) testimony of consumer acceptance of Mary Carter paints as demonstrated over the years by increased sales, repeat sales, and by an independent consumer preference survey (CX 55, 56, 59; RX 2 p. 6; RX 3 for identification; R. 120-23, 126-30, 143-44, 186, 194); (f) testimony concerning the qualification of Mary Carter paint for the Good Housekeeping Seal of Approval (RX 22 for identification; R. 191-94); (g) testimony concerning the qualification of Mary Carter paint for the American Hotel Association certificate of acceptability (RX 21 for identification; R. 186-90).

* Respondent excepted to the hearing examiner's exclusion of the evidence as to the comparable quality and price of paints. The Commission sustained the hearing examiner's ruling and respondent took its exception to the Court of Appeals.

jority, "even if the item required to be purchased, i.e., a single can of Mary Carter paint, had had a usual and regular price when the offer was first made, the price would eventually become the usual and regular price of two cans of paint" (R. 66). The majority also said the cases were "distinguishable" in that the merchandise required to be purchased in *Black* and *Book-of-the-Month Club* "was not always the same merchandise," that is, the offering was a "series of offers" involving different books at different prices, whereas Mary Carter's continuing offer was of a "combination of the same two articles" (R. 66). So, finally, the majority stated that the policy statement with respect to the use of the word "free" announced in the *Black* decision "is not applicable to respondents' advertising" since the cost of one can or two cans was the same, hence "the cost of the second can of paint was included in the price paid by the purchaser, and this second can, therefore, was not given as a gift or gratuity or free of charge to the purchaser" (R. 67).

Commissioner Elman, in dissent, said that the majority's holding that Mary Carter had not established a single can price for its paint "simply is not so" (R. 81). He noted that a single can price was fixed and that a can could not be bought for less, and that although the customer may and usually does take the second "free" can, whether he does or not the first can will still cost him the set price. "Thus, to paraphrase *Black*, the 'regular price' of Mary Carter paint 'sold without the premium is the same as the price with the premium.' The second can of paint 'does not cost the customer anything;' regardless of how it is paid for, it 'is Free To Him.' " (R. 84).

As to the majority reasoning that the second can could not be regarded as "free" because its cost was included in the price paid by the purchaser for the first can, Commissioner Elman said: "All this is perfectly obvious to all concerned here, as it also was in *Black* and *Book-of-the-Month Club*. And, unless those cases are now overruled, they permit use of the word 'free' in such circumstances" (R. 81).

Of the distinction which the majority drew between Mary Carter and *Book-of-the-Month Club*, Commissioner Elman observed that both cases involved a like "continuing offer over an indefinite period of time that can be acted on again and again by the same purchasers," and "The fact—deemed crucial by the Commission—that Mary Carter's paint remains the same while the Club's book titles change is obviously a distinction without a difference" (R. 84).

Commissioner Elman concluded that in any event the majority's "strained effort to 'distinguish' *Black* is much ado about nothing" because of the more crucial and fundamental failure to indicate how Mary Carter's offer would deceive. Of this, Commissioner Elman said (R. 88):

"This brings me to what is perhaps the most serious deficiency in the majority opinion. The duty of the Commission in this case was to determine whether Mary Carter had violated Section 5 of the Federal Trade Commission Act by engaging in any 'unfair or deceptive acts or practices'. Yet nowhere does the Commission explain what was 'unfair or deceptive' about what Mary Carter did. The word 'deceptive' appears in the Commission's opinion on page 2 in a description of the allegations

of the complaint and again on page 10 in the observation that a good motive cannot justify a deceptive practice. But we are never informed as to who is, or might be, misled by Mary Carter's 'Buy 1 and get 1 Free' offer, or as to how that deception might be brought about."

The Court of Appeals agreed with Commissioner Elman, particularly that the Commission in this case had departed from its established rules on which Mary Carter "had every right to rely" and had reverted to its discarded reasoning in the first *Book-of-the-Month Club* case; that it had not done this forthrightly, however, but had purported to find this case "distinguishable" from *Black* when it was "indistinguishable;" and that the Commission decision had the "serious deficiency," pointed out by Commissioner Elman, that "nowhere does the Commission explain what was 'unfair or deceptive' about what Mary Carter did" (App. 21-23).

Judge Brown, concurring, noted that the "precise action" of Mary Carter was permitted by *Black* and the Commission's "Free Rule;" that Mary Carter's offer met "fully, honestly, and in good faith" the requirement of the "Free Rule;" and that with the Commission holding that Mary Carter may not do what the Commission's two pronouncements clearly permit, "Mary Carter is the victim of individualized discrimination" (App. 28).

Reasons for Denying the Writ

The Commission, phrasing its petition as presenting an "important question" calling for this Court's re-

view, poses the question as one of the "authority" of the Commission.

We submit that there is no question of Commission "authority" presented at all. The question is simply one of whether the decision of the Commission, that certain advertising was "deceptive and misleading," was soundly based on the undisputed facts.

The Commission neither raised below nor did the Court decide any question of Commission "authority." The case involved only the undisputed facts and the Commission's own rules and decisions. The Court of Appeals held that a finding of "deceptive and misleading" advertising was not warranted on the facts—indeed, the decision of the Commission had not even suggested who might be misled by the advertising or how he might be misled—and that the Commission's decisions in *Black* and *Book-of-the-Month Club* and its "Free Rule" sanctioned the Mary Carter advertising.

The concurring opinion of Judge Brown in the Court of Appeals points up even more clearly that there is no question in this case of the "authority" of the Commission. Judge Brown indicated that the Commission might have considerable latitude in the formulation of a "free rule," and he took the case on the basis of the Commission's own promulgation, and found that the decision of the Commission was "individualized discrimination" against respondent.

The case was of importance, in that it was important that such vagary on the part of the Commission be corrected; but the Court of Appeals having corrected it, nothing of importance remains, certainly no important

question of Commission authority, or any question warranting a review by this Court.

The petition suggests that the decision of the Court of Appeals "engenders considerable uncertainty in this important area of the Commission's work" (Pet. 6). On the contrary, the decision makes for certainty, as against what Commissioner Elman and the Court noted was the "uncertainty and confusion" introduced by the Commission's decision, "needlessly and unsettlingly, into an area of business activity where businessmen and the bar have long regarded the Commission's position as definite and clear" (R. 70; App. 21).

As also stated by Commissioner Elman (R. 90), and by the Court of Appeals (App. 22), respondent had "every right to rely" on the rulings which the Commission had made with respect to the use of the word "free" in advertising. "Individualized discrimination" against respondent is intolerable and called for the correction and return to certainty which the Court of Appeals decision provides in accordance with the Commission's own rules. The Commission should not have the ear of this Court in an attempt to gain a license to play fast and loose with its own rules and to practice individualized discrimination.

Although, as Commissioner Elman and the Court of Appeals noted, the Commission's decision gave no indication of wherein the alleged deception in respondent's advertising lay, the petition does undertake a specification—"It is the representation that \$6.98 was the usual price for a gallon of paint that constitutes the unfair and deceptive practice" (Pet. 7).

The answer is that the representation, as the undisputed facts stated by the Court of Appeals show, is altogether true. As stated, "the single can price of its paint is the advertised price for a single can and the only price at which Mary Carter paint can be purchased. Naturally, the purchaser will usually take the second can, but this is optional with him; at times he takes only the single can, and the price paid is the same single can price" (App. 18).

Respondent went further even than the Commission in respect to the "representation" and "implication" of its advertising. Respondent forthrightly took the position that the buying public would be led to believe that the Mary Carter single can price was the standard value of that quality of paint according to the prices of leading brand paints of like quality. And respondent assumed the burden of proving that value and proved it abundantly, so that the hearing examiner reported that Mary Carter paint was shown to be "equal to or better than comparable, similarly-priced, top-quality national brand paints" (R. 47)*.

* Respondent said in its brief in the Court of Appeals:

"Looked at from the public point of view, which is the touchstone, the Commission's approach and reasoning are all beside the point, a preoccupation with considerations which are of no interest to the public and have no bearing on any question of possible public deception. The prospective purchaser of paint wants to know the pertinent and important facts about the value he is receiving and is not in the least concerned with when the price was established or how long the value given has been going on. He is interested in comparative available values and the question in a case involving alleged deceptive advertising and unfair competition is solely one of whether the value represented is the

This fact meets and disposes of the argument in the petition around the "ordinary and usual price" and the "usual and customary retail price for the single article in the trade area" (Pet. 10-12). Mary Carter paints were shown, and found to be, priced on a single can basis at the usual and customary price for paint of that quality, both as to respondent's own single can price and as to the single can price of comparable paints of other leading paint manufacturers.

There could not be, therefore, and was not found to be, any violation of the Commission's "Free Rule" or pricing guides, for indisputably respondent had neither increased its usual price nor reduced the quantity of its article, and the Commission acknowledged that there was "no question" as to the clarity of the advertising to satisfy the Commission's rule in that respect (R. 59).

The petition removes any doubt that there might have been as to the Commission's intention with respect to the maintenance or modification of its ruling

value given, that is, whether the purchaser is getting what he would be led to believe from the advertising.

"We do not quibble. We acknowledge, indeed assert, that the public would be led to believe and is entitled to believe from Mary Carter advertising that the price of a single can of Mary Carter paint is a market standard of value, the standard or customary retail price for paint of comparable quality, and that the second can free means that the purchaser is getting double value for his money. If that be the fact, as it was shown to be the fact in the evidence proffered and reported at the hearings, there is no possible basis for claiming that the public is deceived or that the Mary Carter advertising is in any way misleading."

in the *Black* and *Book-of-the-Month Club* cases. The Commission stands upon those cases (App. 14). Therefore, the Commission's attempt at distinguishing the present case from those cases becomes of crucial importance.* The distinction attempted in the petition fails just as Commissioner Elman and the Court of Appeals found it to fail.

The only difference between the cases is that one is books and the other is paint.

Black and *Book-of-the-Month* were both cases of a merchandising policy starting with, and continuing as, a regular practice of offering "free" books with the purchase of books. *Black* in his "Detective Book Club" offered "Free" a triplicate volume of novels with a membership obliging a member to take four such volumes in the next twelve months. *Book-of-the-Month* was a continuing offer of "Buy Two Books; Get One Free."

The petition's suggestions that the Commission's "Free Rule" and its decisions in *Black* and *Book-of-*

* The petition's citation of *Federal Trade Commission v. Standard Education Society*, 302 U. S. 112, as in "accord" with the Commission's ruling in this case (Pet. 8), is amiss. That case bears no resemblance to the present case. The word "free" was there falsely used together with other false and fraudulent statements and practices "tied together as part of the same sales plan," including fictitious testimonials, false listings of contributors to the encyclopedia, false representations to prospective purchasers that "by reason of their prestige and influence they have been selected by the company to receive a set of books free of cost for advertising purposes," and false representations that "the regular price of the loose-leaf supplement alone was \$69.50 and that the usual price of both books and loose-leaf supplements was much in excess of \$69.50."

the-Month are not applicable to respondent's practice, because they were intended to apply only to "situations in which the newcomer offers a specific product that he has not sold before but others have sold" (Pet. 13), and are "addressed only to introductory offers by one breaking into the market" (Pet. 13), and apply only to "free" articles "given on some extraordinary occasion" (Pet. 14), are completely refuted by the fact that neither the decisions nor the rule state or suggest any such qualification or are consistent with any such interpretation.*

Neither *Black* nor *Book-of-the-Month* was a case of a product previously sold by others. The triple book volume sold by Black's Detective Book Club was distinctly its own compendium. *Book-of-the-Month* Club puts out current titles, but of its own edition, printing and binding. Neither "free" offer was "introductory," nor made for any limited period or "extraor-

* It will be noted that the petition's suggested distinctions between *Black* and *Book-of-the-Month* on the one hand and Mary Carter on the other are somewhat different from the distinctions drawn in the opinion of the Commission in this case (*Supra*, pp. 10-11). They are also different from the distinctions drawn by counsel for the Commission in their brief before the Court of Appeals. Their counsel did not attempt to support the opinion of the Commission in this respect, but argued (1) the Commission was not estopped by its decisions in *Black* and *Book-of-the-Month*, and (2) the "Free Rule" was intended to apply "only when an item not ordinarily included is given with the purchase of another item at its usual and regular price"; it was not intended "to sanction the word 'free' in describing articles usually included in a combination." Of course, *Black* and *Book-of-the-Month* were combinations of the same articles, usually, regularly and continuously "included in a combination."

dinary occasion," but both were continuing offers as a regular business practice.

The *Black* and *Book-of-the-Month Club* cases are, as the Court of Appeals found, indistinguishable, in what the petition terms their "essential characteristic," from the Mary Carter case and that fact leaves nothing for this Court to review.

It remains only to respond to the suggestion of the petition (Pet. 13-14) that the Court of Appeals should not have dismissed the complaint, but should have remanded the case to the Commission "to hear the proffered testimony" of the value of Mary Carter paints on the basis of the usual and customary price of paints of like quality—testimony that was before the Commission but which the Commission refused to consider. What is necessarily meant by this suggestion, if it means anything, is that the Commission should be given another opportunity to offer counter-proof, for the only conclusion to be drawn from the proffered evidence was the one which the hearing examiner drew. There is nothing more to hear of the proffered testimony. As to any further hearing or consideration of any possible issue of the price and quality of Mary Carter paint as compared with leading brand paints, not only did the Commission deliberately reject its opportunity in this respect, but both in their brief and in response to inquiry from the bench on oral argument in the Court of Appeals counsel for the Commission expressed the disinterest of the Commission in any further consideration of the subject or in a remand of the case for that or any other purpose.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 15

FEDERAL TRADE COMMISSION, PETITIONER

v.

MARY CARTER PAINT CO., ET AL.

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT**

BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (R. 237)¹ is reported at 333 F. 2d 654. The opinion of the Federal Trade Commission (R. 40-66) is reported at 60 F.T.C. 1845. The initial decision and order of the hearing examiner (R. 20-38) are reported at 60 F.T.C. 1830.

¹"R." refers to the printed record herein, "CX" refers to Commission exhibits, and "RX" refers to Mary Carter exhibits.

JURISDICTION

The judgment of the court of appeals was entered on June 19, 1964 (R. 249). On September 17, 1964, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including October 15, 1964, and on October 14, 1964, he further extended the time for filing to and including October 26, 1964. The petition was filed on the latter date and was granted on January 18, 1965 (R. 252; 379 U.S. 957). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45, provides in part as follows:

(a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

* * * *

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

QUESTION PRESENTED

Whether the Federal Trade Commission exceeded its authority in holding it to be an unfair or deceptive act or practice, violating Section 5 of the Federal

Trade Commission Act, for a seller regularly to advertise that the purchaser of a single unit at its represented regular price will receive a second unit "free," when in fact the stated price has always been the seller's regular price for two units.

STATEMENT

The essential facts are undisputed. Respondent Mary Carter Paint Company ("Mary Carter") manufactures paint and sells it to the public through more than 500 retail outlets (which are wholly-owned) and through franchised dealers located in 28 eastern and southern States (RX 2, R. 149, 152-153, 157). In 1960, its sales totaled \$12,000,000 (R. 22).

From the time it began business in 1951, Mary Carter, as an established and permanent policy, has advertised that for every can of paint purchased it will give the purchaser a "free" can of equal quality and quantity (RX 2, R. 158-159; R. 124). Examples of such advertising are:

"Buy one get one FREE" (RX 23, R. 199; CX 29, R. 208).

"Every 2nd Can FREE of Extra Cost" (CX 2, R. 200; CX 8, R. 204).

"Buy only half the PAINT YOU NEED!" (CX 5, R. 202).

"ACRYLIC ROL-LATEX * * * \$2.25 qt. \$6.98 gal. Every 2nd Can Free" (CX 41, R. 213; CX 45, R. 215).

Many different varieties of Mary Carter paint are advertised at \$2.25 per quart or \$6.98 per gallon

(e.g., CX 45, R. 215; CX 47, R. 216; CX 49, R. 218). A purchaser buying paint at this price receives two quarts for \$2.25 or two gallons for \$6.98.

The policy of the company is to charge the advertised price whether or not the purchaser takes the "free" can (R. 70, 146-147). If a purchaser wants only one gallon, he may buy two quart cans at \$4.50 and receive two quarts "free," thus paying \$4.50 for a gallon of paint. Purchasers paying \$4.50 for four quarts sometimes were given gallon cans (R. 33, 77; CX 67, R. 223, 231-232).

On February 15, 1961, the Federal Trade Commission issued a complaint against respondent Mary Carter charging that its advertising was false and misleading, in violation of Section 5 of the Federal Trade Commission Act (R. 5-9).³ After full administrative proceedings the Commission (Commissioner Elman dissenting) held that Mary Carter had engaged in misleading advertising, and issued a cease-and-desist order (R. 37-38, 40-66). The Commission stated that although there had been a "few isolated instances" where a purchaser paid the unit price but took only one can of paint, Mary Carter "usually and customarily" had "sold two cans of paint for the so-called single can price"; and it agreed with the examiner's finding "that the amount designated in respondents' advertising as the price for a can of Mary Carter paint is not the usual and regular price per

³ The complaint also named as respondents three individuals who were at the time, or had been, officers of Mary Carter. The complaint was dismissed against two of them (R. 22-23, 38). We shall refer to Mary Carter as respondent.

single can but the usual and regular price for two cans" (R. 46; see R. 36-37, 41). The Commission further held (R. 43-48) that neither its previous decisions nor any one of its Guides Against Deceptive Pricing justified Mary Carter's deceptive advertising. The Commission also sustained the examiner's ruling excluding evidence offered by Mary Carter to show the quality of its paint as irrelevant to the issue whether its advertising was deceptive (R. 48).

The Commission's order directed Mary Carter to cease and desist from representing (a) that the price of a product is "respondents' customary and usual retail price" when that price is greater than the price "at which such merchandise is customarily and usually sold by respondents at retail," and (b) that an article is being given free "or without cost or charge, when such is not the fact" (R. 37-38).

The court of appeals set aside the Commission's order and ordered the complaint dismissed (R. 237-248). The court, "adopt[ing] and approv[ing] the reasoning and the result" in Commissioner Elman's dissenting opinion (R. 243), held that the Commission had failed to explain what was unfair or deceptive about Mary Carter's advertising, and had departed from its previous decisions governing the use of the word "free" in advertising. The court further ruled that the cease-and-desist order was impermissibly vague.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent conceded before the hearing examiner that a large measure of the success of its advertising

program is attributable to its use of the word "free" to describe every second can of paint it offers for sale (R. 22). The obvious effectiveness of that word as a sales device is demonstrated not only by respondent's experience, but also by the readily observable fact that—as Commissioner Elman noted—"[i]t is, and has long been, commonplace in the United States for merchandise to be advertised and sold at a stated price, with another article, or installation or service, or an incidental part or accessory, included 'free' * * *" (R. 51).

When a product or service is offered "free" on the condition that some other product or service is purchased, the "tied" commodity is obviously not "free" in a strict literal sense—*i.e.*, the consumer is not getting it totally without cost nor is the manufacturer or distributor giving it away without some recoupment of its expense out of the added profits from increased sales. The word "free" in this context must be given a relative definition—the combination includes a "free" premium because it does not cost more than the "tying" product or service costs separately. In this sense the word "free" has become a part of contemporary merchandising. It communicates to the public that a manufacturer or distributor is offering some particular incentive to purchase which is a *bona fide* benefit to the consumer.

Implicit in the announcement that the premium is being offered "free" is the representation that the purchaser is being required to pay no more for the "tying" product than he would have had to pay ab-

sent the offer. If a manufacturer were to add to the ordinary sales price of a "tying" product part or all of the cost of a "free" premium, he would obviously not be offering the premium "free." The same would be true if he were to reduce the usual quantity or quality of the tying product in order to offset the extra cost of the "free" product or service. Consequently, the Commission announced in *Walter J. Black, Inc.*, 50 F.T.C. 225, 235-236, the principle that the word "free" may not be used to describe a product whose purchase is conditional on the purchase of another if the latter's ordinary price has been increased or its usual quality or quantity decreased for the duration of the offer.

The present case admittedly involves no violation of the standard established in the *Black* case because it concerns a product which had no "ordinary" price or "usual" quality or quantity other than under the terms of the challenged offer. In other words, the question in this case is whether a product or service may be labeled "free" if it may be obtained only upon the purchase of another product or service which neither has nor is expected to have any regular or usual sale price independent of the tied product.

The disagreement between the majority of the Commission on the one hand and a majority of the court of appeals³ and the dissenting Commissioner on

³ Judge Brown concurred on the ground that respondent had been the victim of "individualized discrimination" because the Commission departed from the standard announced in the *Black* case (R. 247-248). For reasons stated at pp. 25-33, *infra*, we believe that this case involved no departure from *Black*.

the other turns, in our view, on whether the sort of benefit here being offered by respondent—if it is a benefit at all—can fairly be described as a “free” offer. The Commission was of the view that since “the amounts designated by respondents in their advertising as the price per single can of Mary Carter paint has [sic], in fact, been the usual and regular price of two cans of such paint * * *” (R. 48), it is deceptive for respondent to call any can “free.” A majority of the court of appeals, however, rejected the conclusion that the word “free” had been deceptively used (R. 242). We submit that respondent’s advertisement is deceptive because (1) it misrepresents to consumers what the usual price of respondent’s paint is and (2) it confuses consumers by calling a simple price advantage a “free” offer.

When respondent advertises that it is offering a “free” can with every can that is purchased, consumers are led to believe that the offer is for a limited time only, and that respondent’s product has ordinarily sold (and will sell in the future) at the advertised price for each single can. In other words, respondent represents to potential purchasers that whereas they may now purchase two gallons for \$6.98, the usual price for that quantity of paint is \$13.96. That representation is false, and it is material because it induces purchases which might not otherwise be made.

Even if no “limited time” implication were lurking in respondent’s advertisements, they would still be deceptive because they use the word “free” in a misleading manner. The only meaningful sense in which a

product "tied" to the purchase of another product or service may be called "free" (assuming that the quality and quantity of the latter remains identical) is when the price is no greater for the package than for the identical "tying" product alone. When, as here, the "tying" product has no ordinary price independent of the package, a premium offered with it cannot fairly be called "free." Since what is being compared is the price of the product being sold with the price of a competitor's product represented as being of equal quality, the most that can be said accurately is that the former is "cheaper" or "lower in price" than the latter.

The Commission explained in its opinion that it considered respondent's advertisement deceptive because, unlike prior cases in which the Commission had permitted use of the word "free," there was, in the present case, no "established" or "usual and customary" retail price for the "tying" product—i.e., a single one-gallon can of respondent's paint. The Commission found that the only "established" price was for the package—i.e., two one-gallon cans of paint.

The Commission's ruling in this case was consistent with its earlier precedents—particularly the decision in *Walter J. Black, Inc.*, 50 F.T.C. 225, where it announced certain rules regarding use of the word "free" in combination offers. The rules announced in the *Black* case were not intended to be exclusive; they apply only to the situation in which the "tying" product has an independent "established" or "usual and customary" retail price. Commission decisions since

Black, as well as the Commission's announced Guides Against Deceptive Pricing, make it entirely clear that the Commission was not intending, when it announced the *Black* rules, to sanction a practice like respondent's when no ordinary retail price has been established for the independent sale of the "tying" product.

ARGUMENT

I

RESPONDENT'S "BUY ONE, GET ONE FREE" SLOGAN IS DECEPTIVE

A. THE SLOGAN MISREPRESENTS THE CUSTOMARY PRICE OF RESPONDENT'S PAINT.

The necessary implication of respondent's offer to supply a "free" gallon of paint with every gallon purchased at \$6.98 is that the customary price of respondent's paint is \$6.98 per gallon, irrespective of quantity. In other words, an advertisement which states "Buy One at \$6.98, Get One Free," induces buyers to believe that the advertiser has sold—and will sell in the future—at a price of \$6.98 per gallon or \$13.96 for two gallons. They are, therefore, encouraged to buy for fear that the offer will lapse if they delay, or by the misapprehension that they are able to obtain two gallons today at a price for which they could yesterday have gotten only one.

Some of respondent's advertisements did state clearly that it had always been respondent's policy to sell "two-for-one" and that it intended to continue to do so (R. 200, 201, 203, 204, 213, 216). Most of the advertisements in the record, however, contain no

such explicit announcement (R. 199, 207, 208, 209, 210, 211, 212, 214, 215, 217, 218, 219). Potential buyers who saw only the latter or who, after scanning the advertisements, remembered only the "Buy One, Get One Free" slogan could reasonably assume that "Buy One" meant "Buy One at the Customary Gallon Price." That price was represented by the advertisement to be \$6.98, whereas, in fact, the actual per-gallon price since the institution of respondent's business and for the foreseeable future was \$3.49.

So far as this implied representation is concerned, respondent is in no different position than if it had begun its operation by selling only two-gallon cans at \$6.98. It could not, after having engaged in this policy over a period of years, begin selling paint in single-gallon cans at the two-gallon price and advertising "Buy One, Get One Free." By offering the combination for \$6.98 under this slogan it would be falsely suggesting to consumers that the per-gallon price theretofore had been \$6.98, instead of \$3.49.

Respondent is no better off because it has always sold its two-gallon package in separate cans under a "Buy One, Get One Free" label. The practical effect of its sales policy has been to offer two gallons for \$6.98, and to refuse to sell less than two gallons. The representation that the purchaser is "buying one" at \$6.98 is, therefore, false. In fact, he is "buying two" at that price—and nothing is being given "free."

B. THE SLOGAN MISLEADINGLY CHARACTERIZES THE SECOND CAN AS "FREE".

While most of respondent's advertisements in this case are, in our view, deceptive for the reason we have just stated—*i.e.*, consumers are induced to believe that they are being given a special offer available for a limited time—this is not their only vice. Even the advertisements which make it entirely clear that respondent has always offered and will continue to offer its paint "two-for-one" are misleading because they misuse the word "free."

In one sense, of course, every difference in price between competitors can be viewed as an opportunity for consumers to obtain something "free." If neighboring fruit vendors *X* and *Y* offer the same quality oranges at 60-cents-per-dozen and 72-cents-per-dozen, respectively, *X* is, in a certain sense, offering two "free" oranges—for the same 60 cents that would buy 10 oranges from *Y*, *X* will provide 12 oranges. Or, for example, the bottler of soda who sells 12 ounces of standard quality for the same price at which his competitor sells 10 might maintain that he is giving 2 ounces "free." But to label these price advantages "free" would be to mislead consumers. The fruit-vendor or soda bottler is really offering his goods cheaper than his competitors; he is not, in the commonly understood sense, offering anything "free." This is because the meaningful standard by which the "free" nature of a combination offer can be measured is the usual price of the "tying" product itself, not the price of a competing product which happens to be of equal quality. For that reason the word "free" carries quite

a different meaning to the ordinary consumer than the words "lower in price" or "cheaper." The latter mean that the consumer must take the manufacturer's or seller's word for the parity of quality; the former means that the commodities whose prices are being compared are, in fact, identical.⁴

The real incentive which respondent offers to purchasers—if its claims regarding its product are true—is that it is able to produce a paint of seven-dollar quality at half the price.⁵ Respondent is not offering anything "free" in the sense that it is attaching a benefit at no extra cost to the purchase of its product

⁴ A sophisticated consumer may, of course, distinguish between these uses of the word "free" and discover that the fruit-vendor is really offering nothing more than a cheaper price per unit. This does not, however, justify the use of the word. "The law is not made for the experts but to protect the public,—that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions." *Aronberg v. Federal Trade Commission*, 132 F. 2d 165, 167 (C.A. 7).

⁵ In its brief in opposition, respondent quotes from its brief in the court below, in which it acknowledged—"indeed assert[ed]"—that "the public would be led to believe and is entitled to believe from Mary Carter advertising that the price of a single can of Mary Carter paint is a market standard of value, the standard or customary retail price for paint of comparable quality, and that the second can free means that the purchaser is getting double value for his money" (Brief in Opp., p. 17, n. *). In other words, respondent concedes that it would be improper for the producer of paint of three-dollar quality to advertise "second can free" and place a six or seven-dollar price on a single can because the "single-can" price—at least in the paint industry—is a representation as to quality.

at the ordinary price; its product has no ordinary price independent of the challenged offer. The only truthful representation respondent could make (if its assertions regarding its paint are factual) is that its product is cheaper than others of like quality. Such advertising would doubtless be less effective than advertising using the word "free"; consumers might not be willing to accept respondent's word that its paint is actually of seven-dollar quality. But that is the essence of respondent's representation and is the full extent of the benefit which it ostensibly offers to consumers. It is entirely proper, therefore, for the Commission to require respondent to state its representation accurately rather than mislead consumers into believing that something is being given "free."

Respondent's defense to the charge of misrepresentation—which is the same as the justification given in its advertisements for not cutting its price in half (R. 200, 201, 203, 204)—demonstrates that the only *bona fide* incentive it offers to purchasers is the low price of its paint compared with paint of similar quality produced by others. Respondent contends that it seeks to communicate to the public the fact that its product is equal in quality to seven-dollar paint, and that this can be done only by charging \$6.98 for a one-gallon can. See Brief in Opposition, pp. 16-17 and note *. If it is not to mislead consumers, however, respondent's choice is either to charge \$6.98 for each gallon (with no "free" offer) or to charge half the price and use other means to persuade the public that its paint is of seven-dollar quality. By labeling one

of every two cans "free" it does what the fruit-vendor does in our illustration at p. 12, *supra*—it transforms a simple competitive price advantage into a more attractive-sounding "free premium" offer.*

The fact that respondent refuses to sell a single gallon for less than \$6.98 does not make its slogan accurate.⁷ First, we submit that the \$6.98 price for a single gallon is, under these circumstances, a mere artifice. Although respondent packages its paint in gallon containers, its sales policy is really no different than if it sold paint in two-gallon cans. The purchaser who wanted only one gallon might, of course, throw away the additional gallon, just as the purchaser under respondent's policy may reject the "free" can. Second, the fact that the "tying" product of a combination package sells alone at the same price as the combination *while the offer is outstanding* does not, *ipso facto*, make the "tied" product "free." If that were true, the Commission would be powerless

* Moreover, there is an added subtle misrepresentation in the seven-dollar price under these circumstances. It suggests to consumers that respondent's paint is not only of seven-dollar quality but does actually sell for seven dollars. Consumers who judge paint by price will be more likely to buy paint which sells at seven dollars than that which is reputed to be of seven-dollar quality. Actually, of course, respondent's paint has never sold for seven dollars per gallon.

⁷ Respondent does, of course, by the terms of the same offer, sell a gallon for \$4.50 if it is bought in quart cans. (Two quarts may be purchased at \$2.25 each, and two quarts would then be added free.) But this is not, in our view, the heart of respondent's deception. Even if the quart offer were eliminated, respondent still would be engaged in deceptive advertising.

to deal even with those situations which respondent apparently admits to be deceptive. If, for example, in violation of the rules set down in the *Black* decision, *supra*, a toothbrush manufacturer raises his usual price from 49 cents to 59 cents and regularly offers a small tube of toothpaste "free," he should not be able to defend against a charge that the advertisement is deceptive by showing that a consumer cannot—after the offer has gone into effect—purchase that toothbrush separately for less than 59 cents. The critical question is what the ordinary or usual price was for the brush *before* the offer was made. Respondent's paint had no such price, and the price for which it sold for the duration of the offer could not establish that necessary element.

Respondent's representation here is essentially the same as the representation in *Federal Trade Commission v. Standard Education Society*, 302 U.S. 112, that an encyclopedia was being offered "free" with the purchase of a supplement. In the *Standard Education* case this Court held that practice deceptive (302 U.S. at 116-117):

The practice of promising free books where no free books were intended to be given, and the practice of deceiving unwary purchasers into the false belief that loose-leaf supplements alone sell for \$69.50, when in reality both books and supplement regularly sell for \$69.50, are practices contrary to decent business standards. To fail to prohibit such evil practices would be to elevate deception in business and to give to it the standing and dignity of truth. It was clearly

the practice of respondents through their agents, in accordance with a well matured plan, to mislead customers into the belief that they were given an encyclopedia, and that they paid only for the loose-leaf supplement. * * *

Here, as in *Standard Education*, it was respondent's practice "to mislead customers into the belief that they were given" a one-gallon can of paint, and "that they paid only for" the other gallon.⁸ In fact, they paid for two gallons of paint at respondent's customary two-gallon price. If, as respondent contends, that price was half of what paint of similar quality was selling for, respondent's obligation under Section 5 was to publicize that fact without misleadingly relying upon the suggestion that something was being given away for nothing.

The practice of calling a premium "free" when it is, in fact, part of a package which the manufacturer or distributor has always offered for sale and intends to continue to offer for sale in combination form is particularly unwarranted when the "tying" commodity and the "free" premium are the identical product. If respondent had offered a "free" brush with every can of paint and intended always to continue

⁸ Decisions of courts of appeals which have followed *Standard Education* and are in point here are *Standard Distributors, Inc. v. Federal Trade Commission*, 211 F. 2d 7 (C.A. 2); *Basic Books, Inc. v. Federal Trade Commission*, 276 F. 2d 718 (C.A. 7), affirming 56 F.T.C. 69. *Kalwajtys v. Federal Trade Commission*, 237 F. 2d 654 (C.A. 7), certiorari denied, 352 U.S. 1025, involved a representation that a photograph album was given away with the purchase of ten photograph certificates.

doing so, the Commission might still—for the reasons stated above—consider the advertisement deceptive.⁹ But that would be a more difficult case than the present one. For when the premium consists of an added quantity of the same product being sold, respondent has available more truthful means of conveying the message that its offer is cheaper than to call some of its product “free”; it can simply charge less per can.

By holding respondent’s advertisement in the present case to be deceptive, the Commission did not, by any means, inhibit use of the word “free” when that word fairly describes what the seller is offering. When the “tying” product has, or is expected to have,¹⁰ an ordinary and usual sale price separate and apart from the “tied” product, a premium or bonus which is offered, for a limited time or to a limited class of purchasers in a package which sells at the same price can fairly be characterized as “free.”¹¹

⁹ See, e.g., *Tenax, Inc.*, 60 F.T.C. 613 (“free” gift offered with purchase of freezer).

¹⁰ A “free” offer might be made for a limited time as a means of introducing a new product. If, for example, a new toothbrush to retail at 59 cents were to be introduced, it might be permissible to offer a “free” tube of toothpaste for purchasers during the first month or two in which the brush is sold. This would be permissible, however, only if the brush *will* retail at the combination price and the offer will be outstanding for a limited time.

¹¹ This is the basis for the Commission’s decision in the *Black* case, *supra*, and in *Book-of-the-Month Club, Inc.*, 50 F.T.C. 778, where it sustained use of the word “free.” The books sold in those cases had fixed standard prices for which

Indeed, if the seller offers an additional quantity of the same product in a "special limited-time" package, that, too, might fairly be described as a "free" offer. But when, as here, the "tying" product has no independent ordinary price, it cannot fairly be sold in a large quantity under the illusion that half is being sold and half is being given away.

The Commission's finding that respondent's advertising was deceptive in this case simply put respondent, which had devised this sales technique at the inception of its operations, on a par with its competitors. Other paint companies which have sold their product for \$3.49 or thereabouts are prohibited by the *Black* rules from raising their prices to \$6.98 and offering "two-for-one" or "Buy One, Get One Free." Respondent should be in the same position because it has effectively been selling its paint at \$3.49 per gallon through its consistent "two-for-one" offer.

Finally, this is a case, like *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374, where the Commission's conclusion regarding the deceptive nature of the advertisement is entitled to great weight. This Court observed in the *Colgate-Palmolive* case (380 U.S. at 385) that "as an administrative agency which deals continually with cases in the area, the Commission is often in a better position than

they were generally available. Hence any additional books offered by the respondents to new members were being given "free" in the sense that the purchasers were being asked to pay no more than they would have paid had they bought the books from the same seller apart from the offer. See pp. 27-29, *infra*.

are courts to determine when a practice is 'deceptive' within the meaning of the Act." The Court further observed that the rule that the Commission's determination is to be respected by reviewing courts "is especially true with respect to allegedly deceptive advertising since the finding of a § 5 violation in this field rests so heavily on inference and pragmatic judgment." *Ibid.*¹³ The court of appeals erred in this case in failing to consider the respects in which respondent's advertising was misleading and in failing to give due weight to the Commission's determination that it violated Section 5.

¹³ The Fifth Circuit recently stated the proper standards for review in *Carter Products, Inc. v. Federal Trade Commission*, 323 F. 2d 523, 528:

First, in considering the Commission's findings and order, the reviewing court must recognize certain fundamental principles. "The meaning of advertisements or other representations to the public, and their tendency or capacity to mislead or deceive, are questions of fact to be determined by the Commission." *Kalwajtys v. F.T.C.*, 7 Cir., 1956, 237 F.2d 654, cert. den'd, 1957, 352 U.S. 1025, 77 S. Ct. 591, 1 L. Ed. 2d 597. It is the Commission's function to find these facts and a court should not disturb its determination unless the finding is arbitrary or clearly wrong. *Kalwajtys v. F.T.C.*; *Gulf Oil Corp. v. F.T.C.*, 5 Cir., 1945, 150 F. 2d 106, 108. Furthermore, the Commission may draw its own inferences from the advertisement and need not depend on testimony or exhibits (aside from the advertisements themselves) introduced into the record. *New Amer. Library of World Literature v. F.T.C.*, 2 Cir., 1954, 213 F.2d 143; see *Zenith Radio Corp. v. F.T.C.*, 7 Cir., 1944, 143 F.2d 29. The Commission need not confine itself to the literal meaning of the words used but may look to the overall impact of the entire commercial.

THE COMMISSION ADEQUATELY EXPLAINED WHY IT CONSIDERED RESPONDENT'S ADVERTISING DECEPTIVE

The court of appeals was of the opinion that the Commission had failed to explain what was unfair or deceptive about respondent's advertising (R. 242), and respondent has also urged in this Court that the Commission's opinion was deficient in this regard (Brief in Opp., p. 15)—a view shared by the dissenting Commissioner (R. 64). A complete reading of the Commission's opinion demonstrates, however, that the Commission stated the legal standard which it applies in cases of this sort and that it explained why respondent's advertising did not qualify under this standard. Since the opinion was cast in terms of the arguments respondent made before the Commission, it did not (and could not be expected to) consider some of the underlying premises—which we have discussed at pages 10-20, *supra*—regarding the deceptive nature of this form of advertising.

After stating the undisputed facts, the Commission's opinion (R. 40-49) noted that respondent had "taken numerous exceptions to the hearing examiner's findings, conclusions and order" and observed that the "principal contention" made was "that the hearing examiner erred in concluding that Mary Carter's advertising was not proper under the so-called 'free rule' enunciated by the Commission in the *Black* decision." (R. 41). The opinion then traced the development of the *Black* rule and concluded that a "necessary corollary" of that decision "is that a person

can offer as 'free' an article which may be obtained upon the purchase of another article only if the article required to be purchased has an established market price" (R. 44-45). This rule, the Commission observed, was incorporated into its 1958 Guides Against Deceptive Prices, which condemned "two-for-one" sales "unless the sales price for the two articles is the advertiser's usual and customary retail price for the single article in the recent, regular course of his business." A "Note" to this rule, also quoted by the Commission in its opinion, permitted "two-for-one" sales by a newcomer if the advertised price was the same as "the usual and customary retail price of the single article in the trade area, or areas, where the claim is made." The opinion "emphasized" that this rule authorizing "two-for-one" sales by newcomers "refer[s] to the price charged by other retailers for the Specific article offered for sale by the person making the 'two for the price of one' claim * * *, and not to a similar or comparable article" (R. 45).

This portion of the Commission's opinion discloses quite clearly, we believe, that the Commission considers use of the word "free" to be deceptive in any situation other than one involving a product having an independent "usual and customary retail price"; it is not enough if similar products of like quality have an established price in the area. It is true that the opinion did not elaborate the Commission's reasons for distinguishing between products having a "usual and customary" price and those which have no such established sales price. But the Commission

was concerned with respondent's contention that its advertisement was permissible by the standards announced in *Black*, and it sufficed, for purposes of this argument, to distinguish the *Black* rules as relevant only to products having a "usual and customary" price.

Indeed, although the remaining portion of the Commission's opinion—which was devoted primarily to establishing that respondent's paint had no ordinary or usual price other than two gallons for \$6.98—did not explicitly focus upon the nature of the misrepresentation involved here, the Commission in various statements made in the course of the opinion adverted to what it considered deceptive. One instance was the Commission's observation that, "under the circumstances, respondents could not, for example, change their advertising to read 'usually and regularly \$6.98 per gallon—now two gallons for \$6.98' " (R. 46). This was, as we have explained at pp. 10-11 *supra*, the implied representation in respondent's slogan—that when the offer would lapse (or before it was ever made) respondent's paint would sell regularly for \$6.98 per gallon. The Commission's conclusion that the \$6.98 price per single can "has, in fact, been the usual and regular price of two cans of such paint, and not one, as represented" (R. 48) also focuses upon this misrepresentation and suggests the alternative ground discussed at pp. 12-20, *supra*—that respondent is engaged in unfair conduct because it disguises a lower price as a "free" offer.

This is not a case, as were *National Labor Relations Board v. Metropolitan Life Ins. Co.*, 380 U.S.

438, and *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, in which the reasons for the agency's order and the grounds upon which it exercised expert discretion are inadequately articulated for judicial review. This decision of the Commission, in light of its earlier cases (see pp. 25-33, *infra*), clearly draws the line between what is permissible and what is impermissible, and the reasons for treating the latter as prohibited are implied in the present opinion and are spelled out more fully in the Commission's precedents. The Commission has unequivocally indicated in the present opinion and in its Guides Against Deceptive Pricing that it would consider deceptive any "free" combination offer by a newcomer unless the identical "tying" product were being sold in the area at an "ordinary and usual price" which did not exceed the combination price.¹³ As this Court observed in *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374, 385: "[W]hile informed judicial determination is dependent upon enlightenment gained from administrative experience, in the last analysis the words 'deceptive practices' set forth a legal standard and they must get their final meaning from judicial construction." No further clarification by the Commission is necessary or desirable for this task.

¹³ By "identical" the Commission means a product which is identical in every respect, including brand name. It is not sufficient to show that a product with the same physical characteristics, albeit under a different brand, has been selling at an established price. That would only prove that the offeror was providing a competitively lower price for a product of equal quality.

III

THE DECISION IN THIS CASE IS CONSISTENT WITH THE COMMISSION'S PRECEDENTS AND ITS ANNOUNCED RULES

Respondent contended successfully in the court of appeals that the Commission's decision in the present case amounted to a departure from rules which the agency had announced in previous decisions and published guides. A majority of the court of appeals, in addition to finding no deception in respondent's advertising, reversed the Commission's order on the ground that the decision in the present case was inconsistent with *Walter J. Black, Inc.*, 50 F.T.C. 225, and *Book-of-the-Month Club, Inc.*, 50 F.T.C. 778 (R. 243). Judge Brown concurred with the majority's result on this ground alone (R. 247-248). We submit that there is no merit to the assertion that this decision conflicted with Commission precedents and that, for reasons which the Commission itself elaborated, the present case is distinguishable from the *Black* and *Book-of-the-Month Club* decisions. Indeed, Commission decisions since the *Black* case support the result reached here and demonstrate that the rules announced in *Black* were not intended to apply to a situation in which a product has no ordinary and usual price.

In *Walter J. Black, Inc.*, *supra*, which was decided in 1953, the Commission reviewed the problem of the use of the word "free" in advertising. It took as its major premise the following paragraph from the government's brief in this Court in *Federal Trade Com-*

mission v. Standard Education Society, 302 U.S. 112 (50 F.T.C. 225, 234-235):

When such an offer of a gift is made, the customer understands from the use of the word "gift" that an article is to be received without any payment being made for it. If he is told that it is to be received "Free of Charge" if another article is purchased, the word "free" causes him to understand that he is paying nothing for that article and *only the usual price for the other*. If this is not the true situation, there is no free offer and a customer is misled by the representation that he is to be given something free of charge. [Emphasis added.]

The Commission went on to say that the "essence of this opinion is that there must be truth in advertising to support the use of the word 'free.' If an advertiser either lies as to the facts or tells only part of the truth in his advertising, and such lies or omissions have the tendency or capacity to mislead or deceive the public, this Commission * * * must inhibit such use of the word 'free' in advertising."

The Commission then addressed itself to circumstances in which the use of the word "free" would be unfair. It said that the Commission would consider use of that word "or any other word or words of similar import or meaning * * * to be an unfair or deceptive act or practice" (1) if all the conditions for receipt of the "free" article were not clearly and conspicuously explained and (2) if the offeror increased the ordinary and usual price of the article required to be purchased in order to obtain the "free" article, or

reduced the former's quality or quantity. 50 F.T.C. at 235-236.

On the basis of these announced standards the Commission dismissed the complaint against the respondent in that case. The respondent involved in *Black* had offered "free" books to the public, whose membership in its two book clubs was being solicited. At the time of the Commission's decision, neither club required its members to commit themselves to purchase any minimum number of books in order to qualify for the "free" offer, but one of the clubs had, prior to 1951, required new members to purchase four books during their first year (50 F.T.C. 229). The price of volumes to members was uniform and books were sold to new and old members at the same price.

The facts of the *Black* case as well as the announced grounds of decision demonstrate convincingly that the Commission was concerned only with a situation in which a seller had been marketing an article at a standard, ordinary or usual price and wished to offer a "free" bonus for a limited time or to a limited group of people (i.e., new members). The announced rules in that case were not intended to cover the entire field of "free" advertising; the Commission neither impliedly nor expressly suggested that it was sanctioning use of the word "free" in every conceivable circumstance not covered by its two categories. Indeed, the assumption underlying the second of the Commission's categories was that "the article of merchandise required to be purchased" had an independent "ordinary and usual price" and that it was separately available at an "ordinary and usual" quality and quantity.

The same was true of the second *Book-of-the-Month Club* decision. The Commission had, in the first *Book-of-the-Month Club* decision, found that it was impermissible for the respondent in that case to use the word "free" in connection with its introductory offer to new members.¹⁴ The second decision modified the earlier order so that, consistently with the *Black* case, such an offer could be made if the enrollment conditions were specifically stated and the club's prices were not raised for purposes of that offer. It is true that the Commission's opinion appeared to say that the word "free" could be used if the two *Black* rules were satisfied (50 F.T.C. at 781), but we believe that statement must be read, in light of the case before the Commission, to refer only to situations in which there is an "ordinary and usual price" for the tying product.¹⁵

¹⁴ The Commission had dismissed the complaint insofar as it charged that the club had engaged in deceptive advertising in reference to the third book which it offered for every two purchased as a "book dividend." See 48 F.T.C. 1297, 1306.

¹⁵ On December 3, 1953, the Commission issued the following policy statement (4 CCH Trade Reg. Rep. ¶ 40,210):

In connection with the sale, offering for sale, or distribution of industry products, it is an unfair trade practice to use the word "free," or any other word or words of similar import, in advertisements or in other offers to the public, as descriptive of an article of merchandise, or service, which is not an unconditional gift, under the following circumstances:

- (1) When all the conditions, obligations, or other prerequisites to the receipt and retention of the "free" article of merchandise or service offered are not clearly and conspicuously set forth at the outset so as to leave

In its opinion in the present case, the Commission distinguished the *Black* and *Book-of-the-Month Club* cases on the ground that they applied "only if the article required to be purchased has an established market price" (R. 44-45). The Commission noted that the books sold as "tying" products in those cases were offered at standard prices which were "no more than the publisher's set price" (R. 47-48). In short, the Commission held that the *Black* rules were not meant to apply to cases such as this one—in which the "tying" product has no ordinary or usual independent price.

Commission decisions rendered shortly after *Black* indicate that the agency did not, by announcing the rules set out in *Black*, intend to decide cases such as the present one. Two months after *Black* was decided, the Commission issued its decision in *Puro Co.*, 50 F.T.C. 454, which involved facts very close to those in this case. The respondent in *Puro* sold its product

no reasonable probability that the terms of the offer will be misunderstood; and, regardless of such disclosure:

(2) When, with respect to any article of merchandise required to be purchased in order to obtain the "free" article or service, the offerer (a) increases the ordinary and usual price of such article of merchandise, or (b) reduces its quality, or (c) reduces the quantity or size thereof.

(NOTE: The disclosure required by subsection (1) of this rule shall appear in close conjunction with the word "free" (or other word or words of similar import) wherever such word first appears in each advertisement or offer. A disclosure in the form of a footnote, to which reference is made by use of an asterisk or other symbol placed next to the word "free" will not be regarded as compliance.)

(a water softening cleanser) under a "Buy One—Get One Free" slogan. It priced a single package at 25 cents and included in each package a coupon entitling the purchaser to a "free" package. The Commission held that the representation was deceptive (50 F.T.C. at 458):

* * * Although respondent claims that the retail customer was not paying 25 cents for *two* packages but was only paying for *one* package and receiving the other one "*free*," this self-serving claim has no support in the record but merely reflects the false illusion which respondent sought to maintain in his advertising. * * *

The Commission did not refer to its recent *Black* decision, and it is a fair inference that it believed *Black* to be inapplicable.

Several years later, in *Ray S. Kalwajtys*, 52 F.T.C. 721, affirmed, 237 F. 2d 654 (C.A. 7), certiorari denied, 352 U.S. 1025, the Commission again had before it a case where one item of several always sold together in combination was advertised as "free." The Commission said (52 F.T.C. at 729):

It is respondents' claim that the album was given free and that the \$39.95 was for the making of the pictures. * * *

The hearing examiner decided that, in actuality, the albums were not given free, that respondents' charge was in large part the price of the album, which, accordingly was not in fact free.

With this conclusion, we agree. * * * The transaction did not involve a gift of the album as that term is commonly understood. Instead, it

was a sale for \$39.95 of one album, plus certain contract rights set out in the certificate

See also *International Association of Photographers*, 52 F.T.C. 1450, and *American Albums, Inc.*, 53 F.T.C. 913.

If there was any doubt remaining with respect to the Commission's policy on offers of the sort involved here (i.e., where the "tying" product has no usual independent price), it was put to rest by Guide V, of the Commission's Guides Against Deceptive Pricing (23 F.R. 7965). The Guide, which was adopted in October 1958 and was still in effect at the time of the Commission's opinion provided:

No statement or representation of an offer to sell two articles for the price of one, or phrase of similar import, should be used unless the sales price for the two articles is the advertiser's usual and customary retail price for the single article in the recent, regular course of his business.

(Note: Where the one responsible for a "two for the price of one" claim has not previously sold the article and/or articles the propriety of the advertised price for the two articles is determined by the usual and customary retail price of the single article in the trade area, or areas, where the claim is made.)

As the Commission observed in its opinion in this case (R. 45), the "Note" explicitly provides that a newcomer (such as respondent was when it instituted and continued its sales policy) may offer "two-for-one" only if the *identical* product is being offered at

the advertised price by others. The suggestion that something is being given away is not permissible under this Guide when, as in the paint industry, there are wide variations in the quality of the products being offered by different sellers. In these circumstances, a newcomer cannot say that he is selling the same article at the "customary retail price" set by others; he may claim only that he is selling goods of comparable quality. The "Note" contemplates use of the word "free" in situations where a newcomer offers a specific product which he has not handled before, but which others in the area have sold. If, for example, a gasoline filling station were to commence handling a brand of tires it had not theretofore carried, it might offer "two-for-one" if it set the combination price no higher than the price at which its competitors sell one of the tires.¹⁶

¹⁶ Guide IV of the Commission's current Guides Against Deceptive Pricing, which became effective January 8, 1964, provides (29 F. R. 180):

"Frequently, advertisers choose to offer bargains in the form of additional merchandise to be given a customer on the condition that he purchase a particular article at a price usually offered by the advertiser. The forms which such offers may take are numerous and varied, yet all have essentially the same purpose and effect. Representative of the language frequently employed in such offers are 'Free,' 'Buy One—Get One Free,' '2-For-1 Sale,' 'Half Price Sale,' '1¢ Sale,' '50% Off,' etc. Literally, of course, the seller is not offering anything 'free' (i.e., an unconditional gift), or 1/2 free, or for only 1¢, when he makes such an offer, since the purchaser is required to purchase an article in order to receive the 'free' or '1¢' item. It is important, therefore, that where

The Commission's cases and published "Guides" adequately put sellers on notice that the rules announced in *Black* were not intended to exhaust the range of possibilities in which the Commission might find the word "free" to be deceptive. The present decision is neither inconsistent with earlier cases nor did it unfairly depart from principles on which respondent was entitled to rely. On the contrary, the history of the Commission's consideration of the problem gave respondent ample notice that its practice would be considered deceptive.

such a form of offer is used, care be taken not to mislead the customer.

"Where the seller, in making such an offer, increases his regular price of the article required to be bought, or decreases the quantity and quality of that article, or otherwise attaches strings (other than the basic condition that the article be purchased in order for the purchaser to be entitled to the 'free' or '1¢' additional merchandise) to the offer, the consumer may be deceived.

"Accordingly, whenever a 'free,' '2-for-1,' 'half price sale,' '1¢ sale,' '50% off' or similar type of offer is made, all the terms and conditions of the offer should be made clear at the outset."

This Guide, like the prior Guide V discussed in the text, rests upon the basic premise that it is deceptive to misrepresent, explicitly or impliedly, that the selling price in connection with which the "free" item is offered is the "price usually offered by the advertiser."

CONCLUSION

The Commission acted well within its statutory authority in prohibiting the practice of representing that one can of paint regularly sells for a stated price and a second can is given free when, in fact, both cans are usually and regularly sold for that stated price. The judgment of the court of appeals should, therefore, be reversed.¹⁷

Respectfully submitted.

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August 1965.

¹⁷ If the Court upholds the Commission's position on the merits, the Commission believes that it would be appropriate to remand the case to it for clarification of its order.



No. 15

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1965

FEDERAL TRADE COMMISSION, PETITIONER

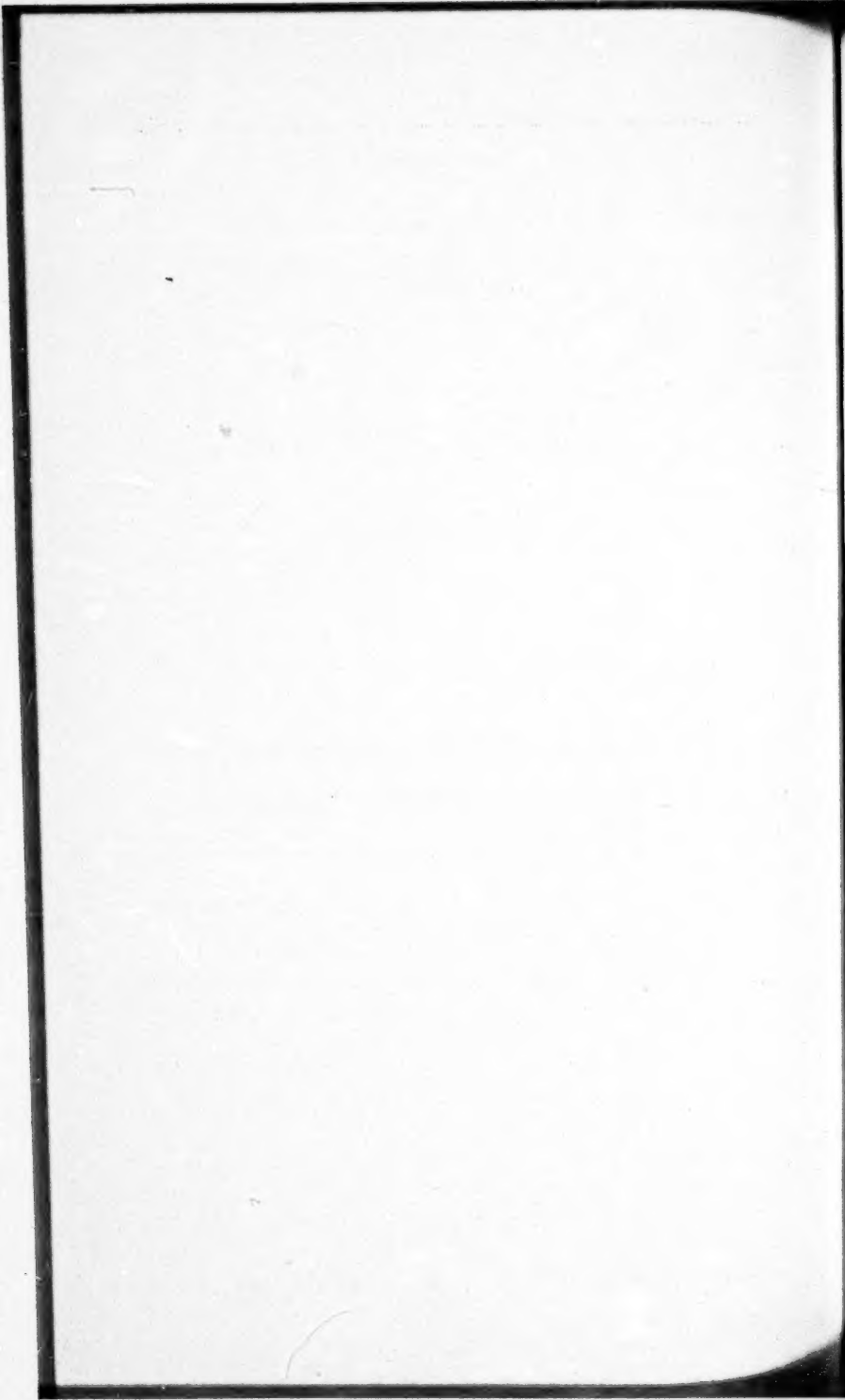
v.

MARY CARTER PAINT CO., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1965

FEDERAL TRADE COMMISSION, PETITIONER

v.

MARY CARTER PAINT CO., ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT*

BRIEF FOR THE RESPONDENT

Question Presented

Whether the Court of Appeals correctly held, upon undisputed facts, that respondent's advertising was not deceptive or misleading, and that the Federal Trade Commission's decision against respondent was unwarranted and contrary to its own established precedents.

Statement

The facts are here stated as the opinion of the Court of Appeals stated them (R. 238-239), with the addition of a statement of the proceedings through the Court of Appeals:

"Mary Carter Paint Co. is engaged in the business of manufacturing, selling, and distributing paint under

the trade name of 'Mary Carter.' At the time of the hearings, the company distributed its paints in more than 27 states of the United States through over 500 retail outlets, including both company stores and franchise dealers. Although still a small company in the paint industry (its share of national paint sales is under one percent), the company has increased its sales from one million dollars in 1955 to twelve million dollars in 1960, a growth achieved by increasing the number of retail outlets and building the repeat business of satisfied customers.

"The basic business policy of Mary Carter, consistently followed over the past ten years, has been to manufacture and sell paint of high quality at a net cost to the consumer of half the amount he would pay for paint of comparable quality manufactured by leading national brand companies. This policy of giving 'double value' is carried out in a merchandising practice of pricing a can of Mary Carter paint at a price comparable to the price of national brand paints of comparable quality, and advertising and giving the purchaser a second can free. Thus, typical Mary Carter advertising in newspapers, magazines, radio, television, store signs, lithographed can tops, and truck sides, states: 'Buy One, Get One Free'; 'Every Second Can Free of Extra Cost'; 'Every Second Can Free'.

"Mary Carter's merchandising policy and the reason for it are specifically stated in advertisements which explain that Mary Carter paint is 'quality priced' and that the company will not 'second rate' its paint with a low-price tag—a point of particular importance

in a market in which the leading paint manufacturers have combined in a sustained publicity campaign to inculcate a public psychology equating quality with price.

“The quality of Mary Carter paint is not questioned. Indeed, at the hearing, Commission counsel contended that the quality of Mary Carter paint was not an issue, and the hearing examiner ruled that the evidence offered on the subject by Mary Carter was immaterial. The Commission has upheld that ruling. The evidence was taken for reporting, however, and both the evidence and the examiner’s report of the evidence establish that Mary Carter paints are as good as, or superior to, paints marketed under leading national brand names at prices comparable to the single can price of Mary Carter paints.

“In accordance with Mary Carter’s consistent merchandising practice, the single can price of its paint is the advertised price for a single can and the only price at which Mary Carter paint can be purchased, the purchaser being entitled to receive without extra cost a second can of the same kind of paint or of any other similarly or lower priced Mary Carter paint. Naturally, the purchaser will usually take the second can, but this is optional with him; at times he takes only the single can, and the price paid is the same single can price.

“There was no evidence, at the hearing, of consumer complaints or of any deception of Mary Carter customers. The extent of consumer satisfaction with Mary Carter paints and with the value offered and

given is indicated, however, by the company's increased sales and, particularly, its repeat-customer sales."

The complaint of the Commission charged that respondent's use of the word "free" in its advertising was "misleading and deceptive," in that "The second can of paint was not, and is not now, 'free', that is, was not, and is not now, given without cost to the retail purchaser since the purchaser paid the advertised price, which was, and is now, the usual and regular retail selling price for two cans of Mary Carter paint."

Respondent answered and maintained at the hearing, before the Commission, and before the Court, that its advertising was a fair and realistic representation of the bargain which it gave and that its use of the word "free" in its advertising was sanctioned by the Commission's decisions in *Matter of Walter J. Black, Inc.*, 50 F. T. C. 225 (1953) and *Matter of Book-of-the-Month Club*, 50 F. T. C. 778 (1953), and the Commission's "Free Rule" as stated in its Guides Against Deceptive Pricing.

While for a time prior to 1953, the Commission took the position that the word "free" in advertising could not be used unless the free item was given away by the advertiser as a "gift or gratuity" without requiring the purchase of any article or attaching any other condition (*Matter of The Book-of-the-Month Club*, 48 F. T. C. 1297 (1952)),¹ the Commission in 1953 ac-

¹ The Book-of-the-Month Club offered a "free" book to subscribers who agreed to purchase at least four books from the Club, and for every two books purchased from the Club the purchaser was to receive a book "free." The Commission found the use of the word "free" to

knowledge that its prior ruling was essentially unrealistic. Then, in recognition of the fact that consumers are fully aware of the economics of offers of a "free" article upon the purchase of an article, and that businessmen the country over had been so using the word "free" in their merchandising and advertising for over a hundred years and were entitled to certainty in their knowledge of its propriety, the rule was laid down by the Commission that ("Until such time as either the Congress of the United States amends Section 5 of the Federal Trade Commission Act, or until an appellate court of the United States clearly interprets the existing provisions of Section 5 of the Federal Trade Commission Act to mean otherwise . . .") a second article may be advertised as "free," although the purchase of an article is required in order to get the second article free, provided the price of the first article is the ordinary and usual price of such merchandise and the price is not increased or the quality or quantity reduced as a predicate of offering the second article "free." (*In the Matter of Walter J. Black, Inc.*, 50 F. T. C. 225, 235-236).²

describe the "enrollment" book to be false, misleading and deceptive, but found that the like charge with respect to the "free" book given with each two books purchased had not been sustained. The order issued was against using the word "free" to describe any book "which is not given to the recipient thereof without requiring the purchase of other merchandise." The Commission reasoned that if the consumer could obtain the "free" item only upon the condition of purchasing some other article, the item was not literally "free" in accordance with the "definite and absolute meaning" of that word, because the purchase price paid by the consumer for the one article included the cost of the "free" item.

² Black in his "Detective Book Club," which sold triple volumes of three detective stories, offered a volume "Free" with a membership obliging a member to buy four volumes in twelve months.

In giving its rationale for overruling the *Book-of-the-Month Club* decision, the Commission in the *Black* case quoted with approval from a brief which had been filed in behalf of the Commission in the Supreme Court in *FTC v. Standard Education Society*, 302 U. S. 112 (1937), and adopted its language as the reasoning of the Commission (50 F. T. C. at 234):

"It is true that the cost of the premium is borne by the manufacturer or seller, and that this cost must eventually be recovered in the price of the product sold if the business is to operate at a profit. But if the regular price of the article sold without the premium is the same as the price with the premium the premium does not cost the customer anything. It is FREE TO HIM regardless of whether or not it is ultimately included in the purchase price, and he does not care whether the manufacturer or dealer makes sufficient profit on the sale to cover the cost of the premium, whether the cost is termed as an advertising expense, or whether it causes the manufacturer or dealer to operate at a loss."

The holding of the *Black* decision, followed by a like revision of the order previously entered in the *Book-of-the-Month Club* case (50 F. T. C. 778), was incorporated in the Commission's subsequently promulgated "Free Rule" (Dec. 3, 1953), which established rules governing the use of the word "free" where receipt of the free item was conditioned upon the purchase of another item (R. 59).³

³ The Commission's "Free Rule" at the time of the complaint and decision of the Commission read as follows:

"In connection with the sale, offering for sale, or distribution of industry products, it is an unfair trade practice to use the word 'free,' or any other word or words of similar import, in

The initial decision of the hearing examiner against respondent in this case went primarily on the ground that Mary Carter's free offer did not meet the Commission's "Free Rule" requirement that the conditions for receipt of the free article be clearly and conspicuously

advertisements or in other offers to the public, as descriptive of an article of merchandise, or service, which is not an unconditional gift, under the following circumstances:

"(1) When all the conditions, obligations, or other prerequisites to the receipt and retention of the 'free' article of merchandise or service offered are not clearly and conspicuously set forth at the outset so as to leave no reasonable probability that the terms of the offer will be misunderstood; and, regardless of such disclosure:

"(2) When, with respect to any article of merchandise required to be purchased in order to obtain the 'free' article or service, the offeror (a) increases the ordinary and usual price of such article of merchandise, or (b) reduces its quality, or (c) reduces the quantity or size thereof."

As restated, effective January 8, 1964, the rule reads as follows:

"Frequently, advertisers choose to offer bargains in the form of additional merchandise to be given a customer on the condition that he purchase a particular article at a price usually offered by the advertiser. The forms which such offers may take are numerous and varied, yet all have essentially the same purpose and effect. Representative of the language frequently employed in such offers are 'Free,' 'Buy One—Get One Free,' '2-For-1 Sale,' 'Half Price Sale,' '1¢ Sale,' '50% Off,' etc. Literally, of course, the seller is not offering anything 'free' (i.e., an unconditional gift), or $\frac{1}{2}$ free, or for only 1¢, when he makes such an offer, since the purchaser is required to purchase an article in order to receive the 'free' or '1¢' item. It is important, therefore, that where such a form of offer is used, care be taken not to mislead the customer.

"Where the seller, in making such an offer, increases his regular price of the article required to be bought, or decreases the quantity and quality of that article, or otherwise attaches strings (other than the basic condition that the article be purchased in order for the purchaser to be entitled to the 'free' or '1¢' additional merchandise) to the offer, the consumer may be deceived.

"Accordingly, whenever a 'free,' '2-for-1,' 'half price sale,' '1¢ sale,' '50% off' or similar type of offer is made, all terms and conditions of the offer should be made clear at the outset."

stated. That conclusion was reached although (a) no such claim had been made in the complaint or suggested at any time during the hearing, and (b) the advertising referred to in the complaint and decision as "typical" concededly (in the examiner's own words) "leaves little doubt that payment must be made for the first can." The Commission necessarily rejected the examiner's principal ground of decision (R. 42).

The Commission did, however, accept the examiner's holding that Mary Carter's advertising was not permissible because the "free" second can of paint was "not a gift of gratuity," although the Commission felt obliged to state in its decision that it "did not thoroughly understand the hearing examiner's reasoning on this point" (R. 42, 48).

At the hearing, the examiner excluded evidence proffered by Mary Carter to show that the quality of its paint was equal to or better than the quality of national brand paints similarly priced per single can. The evidence was excluded upon objection by counsel for the Commission that the quality of Mary Carter paint was not questioned and was not in issue. Under FTC Rules of Practice § 4.12(f), the hearing examiner received the evidence, however, for reporting purposes.⁴

⁴The evidence consisted of (a) testimonial and documentary evidence by Alfred Driscoll, a paint testing expert, detailing twenty different tests made under his direction of Mary Carter paints and five competitive brands of paint in five different categories (R. 107-121; RX id. 9A-E, R. 183-188); (b) testimonial and documentary evidence of production quality controls maintained and tests made of Mary Carter paint in the regular course of manufacture (R. 101-103); (c) testimonial and documentary evidence of comprehensive compara-

Commission counsel made no counter-offer of proof but availed himself of the privilege of cross-examining the Mary Carter witnesses.

The examiner made findings for reporting purposes with respect to the excluded evidence. The substance of the findings made was that (in absence of evidence litigiously offered in opposition thereto) Mary Carter paint was shown to be "equal to or better than comparable, similarly-priced, top-quality national brand paints" (R. 34).

The majority of the Commission found the present case "distinguishable" from the *Black* and second *Book-of-the-Month Club* cases in that, as stated, there was no "usual and customary price" established for a gallon or quart of Mary Carter paint because Mary Carter had always sold its paint on the basis of giving a second can to a purchaser who desired it upon the purchase of one can. "Consequently," said the majority, "even if the item required to be purchased, i.e., a single can of Mary Carter paint, had had a usual and regular price when the offer was first made, the price would eventually become the usual and regular price of two cans of paint" (R. 47). The majority also said

tive performance tests of Mary Carter paints and leading national brand paints by Mary Carter laboratory technicians (R. 129-133; RX 19 A-Fid., R. 189-197); (d) testimony of the low percentage of consumer complaints concerning Mary Carter paints (R. 91, 128-129); (e) testimony of consumer acceptance of Mary Carter paints as demonstrated over the years by increased sales, repeat sales, and by an independent consumer preference survey (R. 88, 133, 138); (f) testimony concerning the qualification of Mary Carter paint for the Good Housekeeping Seal of Approval (R. 136-138); (g) testimony concerning the qualification of Mary Carter paint for the American Hotel Association certificate of acceptability (R. 133-35).

the cases were "distinguishable" in that the merchandise required to be purchased in *Black* and *Book-of-the-Month Club* "was not always the same merchandise," that is, the offering was a "series of offers" involving different books at different prices, whereas Mary Carter's continuing offer was of a "combination of the same two articles" (R. 47). So, finally, the majority stated that the policy statement with respect to the use of the word "free" announced in the *Black* decision "is not applicable to respondents' advertising" since the cost of one can or two cans was the same, hence "the cost of the second can of paint was included in the price paid by the purchaser, and this second can, therefore, was not given as a gift or gratuity or free of charge to the purchaser" (R. 48).

Commissioner Elman, in dissent, said that the majority's holding that Mary Carter had not established a single can price for its paint "siraply is not so" (R. 58). He noted that a single can price was fixed and that a can could not be bought for less, and that although the customer may and usually does take the second "free" can, whether he does or not the first can will still cost him the set price. "Thus, to paraphrase *Black*, the 'regular price' of Mary Carter paint 'sold without the premium is the same as the price with the premium.' The second can of paint 'does not cost the customer anything;' regardless of how it is paid for, it 'is Free To Him.' " (R. 60-61).

As to the majority reasoning that the second can could not be regarded as "free" because its cost was included in the price paid by the purchaser for the first can, Commissioner Elman said: "All this is perfectly

obvious to all concerned here, as it also was in *Black* and *Book-of-the-Month Club*. And, unless those cases are now overruled, they permit use of the word 'free' in such circumstances" (R. 59).

Of the distinction which the majority drew between Mary Carter and *Book-of-the-Month Club*, Commissioner Elman observed that both cases involved a like "continuing offer over an indefinite period of time that can be acted on again and again by the same purchasers," and "The fact—deemed crucial by the Commission—that Mary Carter's paint remains the same while the Club's book titles change is obviously a distinction without a difference" (R. 61).

Commissioner Elman concluded that in any event the majority's "strained effort to 'distinguish' *Black* is much ado about nothing" because of the more crucial and fundamental failure to indicate how Mary Carter's offer would deceive. Of this, Commissioner Elman said (R. 64):

"This brings me to what is perhaps the most serious deficiency in the majority opinion. The duty of the Commission in this case was to determine whether Mary Carter had violated Section 5 of the Federal Trade Commission Act by engaging in any 'unfair or deceptive acts or practices'. Yet nowhere does the Commission explain what was 'unfair or deceptive' about what Mary Carter did. The word 'deceptive' appears in the Commission's opinion on page 2 in a description of the allegations of the complaint and again on page 10 in the observation that a good motive cannot justify a deceptive practice. But we are never informed as to who is, or might be, misled by Mary Carter's 'Buy 1 and

get 1 Free' offer, or as to how that deception might be brought about."

The Court of Appeals agreed with Commissioner Elman, particularly that the Commission in this case had departed from its established rules on which Mary Carter "had every right to rely" and had reverted to its discarded reasoning in the first *Book-of-the-Month Club* case; that it had not done this forthrightly, however, but had purported to find this case "distinguishable" from *Black* when it was "indistinguishable;" and that the Commission decision had the "serious deficiency," pointed out by Commissioner Elman, that "nowhere does the Commission explain what was 'unfair or deceptive' about what Mary Carter did" (R. 243).

Judge Brown, concurring, noted that the "precise action" of Mary Carter was permitted by *Black* and the Commission's "Free Rule;" that Mary Carter's offer met "fully, honestly, and in good faith" the requirement of the "Free Rule;" and that with the Commission holding that Mary Carter may not do what the Commission's two pronouncements clearly permit, "Mary Carter is the victim of individualized discrimination" (R. 248).

Summary of Argument⁵

The Commission acknowledges the propriety, recognized by Commission decisions and rules, of the use of the word "free" in advertising a premium given with

⁵ The argument of this brief, including the Summary, will follow the Commission's brief and respond to its arguments in the order in which they are made. References to the Commission's brief will be "Br." with the page number.

the sale of a "tying" product if the combination does not cost more than the "tying" product costs separately (Br. 6). This use of the word "free," it is explained, communicates to the public that the manufacturer is offering an incentive to purchase which is a "*bona fide* benefit to the consumer" (Br. 6).

Precisely so here. The combination of the "free" premium given by Mary Carter with the purchase of the "tying" product of a quart or gallon of paint costs the purchaser no more than the "tying" product costs separately. And unquestionably, the premium is a *bona fide* benefit to the consumer.

The Commission is in error in what it seemingly means by stating that "The present case admittedly involves no violation of the standard established in the *Black* case because it concerns a product which had no 'ordinary' price or 'usual' quality or quantity other than under the terms of the challenged offer" (Br. 7).

The price of a single can of Mary Carter paint, admittedly, is the only price at which a single can may be purchased and is the price at which it is purchased, and both quality and quantity have been maintained, and, as the cost of the product with the premium is the same as the cost of the product alone, the premium is "FREE" to the purchaser, as described and declared in the *Black* decision. The use of the word "free" here is thus clearly sanctioned by the *Black* and *Book-of-the-Month* decisions of the Commission, and in holding otherwise the Commission was in "violation of the standard established in the *Black* case."

The statement of the "view" of the Commission that "the amounts designated by respondents in their

advertising as the price per single can of Mary Carter paint has, in fact, been the usual and regular price of two cans of such paint," hence it is deceptive for respondent to call any can "free" (Br. 8), and the statement that "here, the 'tying' product has no ordinary price independent of the package," hence the premium cannot be called "free" (Br. 9), and the repetition of variations of such statements that run throughout the Commissions brief, are a single argument that the term "free" cannot be applied to a premium that is always given with the "tying" product. But that is exactly the merchandising that was involved in both *Black* and *Book-of-the-Month Club* and the argument is foreclosed by those decisions.

Black's club and the Book-of-the-Month club regularly and continuously offered "free" books with purchased books. Black offered a "free" book with every enrollment commitment to buy books, and Book-of-the-Month offered a "free" book with the enrollment purchase and a "free" book with every purchase of two books.

A companion argument designed to suggest deceptiveness in Mary Carter advertising is that "When respondent advertises that it is offering a 'free' can with every can that is purchased, consumers are led to believe that the offer is for a limited time only," and this "induces purchases which might not otherwise be made" (Br. 8).

It is notable that this argument is advanced by the Commission for the first time in its brief before this Court. It is not suggested in the opinion of the Com-

mission, nor was it suggested to the Court of Appeals. The argument is insupportable; indeed, it is self-contradictory, and, of course, it is at odds with the *Black* and *Book-of-the-Month* decisions.

When respondent regularly advertises that it is offering a "free" can *with every can that is purchased*, consumers cannot be led to believe that the offer is for a limited time only. Far from there being any such implication or intention to give any such impression, respondent's advertising has consistently and constantly carried the message of "Every Second Can Free." This has not merely been the message constantly repeated in newspapers, magazines, radio and television, but it has been imprinted on store fronts, truck sides and every can top. The Commission is thus straining far beyond the arguable in suggesting that respondent is deceptively leading consumers to believe that its "free" offer is for a limited time only.

If there were any basis for such an argument, *Black* and *Book-of-the-Month* would have been equally susceptible to it. The argument cannot be made here with the pretense of respecting those decisions.

Nor does the Commission progress in arguing that, even if no "limited time" implication were "lurking" in respondent's advertisements, they would still be deceptive in a misleading use of the word "free" (Br. 8), by retrogressing to the premise, sound in itself, that "The only meaningful sense in which a product 'tied' to the purchase of another product or service may be called 'free' . . . is when the price is no greater for the package than for the identical 'tying' product alone" (Br. 8-9), and repeating, factually incorrectly,

that here the "tying" product had no "established" price (Br. 9). The factual assertion is an *ipse dixit*, which, as Commissioner Elman stated, "simply is not so" (R. 58). The uncontradicted evidence is that a single can price for each item of Mary Carter paint has not only been established but strictly adhered to. The "free" offer of Mary Carter is entirely in accord with the "meaningful sense" of a price "no greater for the package than for the identical 'tying' product alone."

ARGUMENT

I

Respondent's "Buy One, Get One Free" Advertising Is Not Deceptive

A. The Advertising Does Not Misrepresent the Customary Price of Respondent's Paint

The first and apparently principal argument now advanced by the Commission in support of its decision—an argument in no way suggested in its decision—is that Mary Carter advertising created the "misapprehension" in the minds of buyers that the "free" offer was for a limited time only and that they should "buy for fear that the offer will lapse if they delay" (Br. 10).

In support of this argument the Commission brief states that some of respondent's advertisements stated clearly that it had always been respondent's policy to sell "Two-for-One"⁶ and that it intended to continue

⁶ Respondent has never used the slogan "two-for-one" or been charged with doing so. Apparently the Commission would now like to introduce that phrasing into the case to make its subsequent argument (Br. 31-32) based on Guide V of the Commission's Guides Against Deceptive Pricing, not mentioned in the complaint or found to have been violated.

to do so (R. 200-201, 203, 204, 213, 216), but that most of the advertisements contained no such explicit announcement (R. 199, 207, 208, 210, 211, 212, 214, 215, 217, 218, 219).

The latter citations of advertisements lend no support to the Commission's very belated suggestion that the advertising is not clear or gives any impression that the "free" offer is for a limited time only. A reference to the cited advertisements will show that they contain, as has all the advertising, including store fronts, truck sides and can tops, the wording "Every second can free."

It seems to us a strange approach to suggest that all the advertising had to make it "explicit" that the offer was a continuing and not for any limited time, when there was absolutely nothing in the advertising to intimate that the offer was for a limited time, and that, failing such explicitness, the advertising should be regarded as creating the "misapprehension" that the offer was for a limited time only. Nevertheless, the advertising could hardly have been more explicit than it was or better calculated to inform the consuming public as to the company policy, carried into practice, of offering a second can free with *every* can purchased. We submit that it is not only much too late but much too tenuous to attempt to sustain the decision of the Commission upon the ground that the advertising did not "clearly" state respondent's policy.

B. The Advertising Does Not Misleadingly Characterize the Second Can as "Free"

The Commission argues that respondent's "free" offer means only that it is selling paint "cheaper,"

and it would force respondent to sell its paint only on a straight single gallon basis of \$3.49 or \$6.98 a gallon (Br. 12-14). The Commission would thus play the game and accomplish the aims of the combine of paint manufacturers in the National Paint, Varnish and Lacquer Association, which conducts a constant national publicity campaign of planted articles against "cheap" paint.

We respectfully refer the Court to Respondent's Exhibit No. 6 for identification at page 181 of the record for a sample of this most intensive and extensive campaign to prejudice the public against any paint that sells for less than the prices maintained by the leading paint makers.

As the Court of Appeals pertinently observed, Mary Carter's merchandising policy for good reason is to price its paint in accordance with its quality and not "second rate" it with a low price tag—"a point of particular importance in a market in which the leading paint manufacturers have combined in a sustained publicity campaign to inculcate a public psychology equating quality with price" (R. 238-239).

We submit that respondent is not compelled to make itself the victim of this competitive combine and to set up its merchandising and advertising as its competitors would order it, so that they may discredit the product, not by any direct challenge to its quality, which could not be sustained, but by the innuendo of the characterization of "cheap paint."

In this connection the Commission brief (Br. 13 fn.) makes reference to respondent's showing that its paints are equal or superior in quality to leading national brand paints of the same single can price and that its

"free" offer is a fair and realistic expression of the double value given. The Commission in its decision regarded this fact as immaterial. Now it is suggested that all the fact proves is that respondent's product is "cheaper" than other paints of equal or lesser quality, not that respondent gives "a benefit at no extra cost" (Br. 13-14).

We would think that even on the Commission's analysis respondent's pricing would have to be considered a "benefit" to the consumer, and its advertising as passing the test suggested in the early part of the Commission's brief, *i.e.*, that it "communicates . . . a *bona fide* benefit to the consumer" (Br. 6).

Niceties of expression aside, it has always seemed to us that what the Commission and Court would be most interested in knowing is whether the respondent's product, pricing and advertising are honest or a fraud. Perhaps the Commission was not required to go into the *bona fides* or benefit on its case, and the respondent was hardly required to do so in the light of the factuality of its selling a single can only at the single can price and giving a second can "free," as that term is understood in contemporary advertising and sanctioned by the decisions of the Commission in the *Black* and *Book-of-the-Month* cases. But the proof on value would seem pertinent in any event, and we submit significant as a matter of substance in showing the true measure of the benefit the consumer receives through respondent's merchandising.

The Commission cites *Federal Trade Commission v. Standard Education Society*, 302 U.S. 112, as being "essentially the same" as the case against Mary Carter (Br. 16). Something more than the extract quoted

from that decision is necessary to make the comparison, or contrast.

In the *Standard Education Society* case—which the Commission did not deem sufficiently apt to mention in its decision here, although it was cited to the Commission by its counsel both in the briefing and argument before the Commission on its review of the hearing examiner's initial decision—the use of the word “free” was part of a blatant fraud scheme. As stated in the opinion of this Court, the “plan” of the respondents in that case involved an elaborate scheme of false representations to sell encyclopedias, including fictitious testimonials and a false listing of contributors to the encyclopedia. The Court noted that as a “first step” in the fraud scheme a salesman would obtain an audience with prospective purchasers by false representations that “by reason of their prestige and influence they have been selected by the Company to receive a set of books free of cost for advertising purposes.” And, “After respondents’ agents thus gained an audience by the promise of a free set of books, they then moved forward under the same general sales plan, by falsely representing that the regular price of the loose-leaf supplement alone was \$69.50, and that the usual price of both books and loose-leaf supplements was much in excess of \$69.50.”⁷

⁷ The following cases, also cited to the Commission by its counsel but not mentioned in its decision in this case, are now cited in the Commission's brief as following *Standard Education* and being in point here (Br. 17 fn.):

Standard Distributors, Inc. v. Federal Trade Commission, 211 F.2d 7 (2d Cir. 1954), involving a fraud scheme in house to house selling of encyclopedias with numerous misrepresentations that the offering was open only to a certain specified number of

It is said that the practice of calling a premium "free" when it is "part of a package which the manufacturer or distributor has always offered for sale and intends to continue to offer for sale in combination form is particularly unwarranted when the 'tying' commodity and the 'free' premium are the identical product" (Br. 17). The described combination of identical "tying commodity and free premium" is an exact description of the offering in *Black and Book-of-the-Month Club*.

And the Commission runs afoul of *Black and Book-of-the-Month* again when it would condition the use of "free" as the characterization of the premium upon its being offered only "for a limited time or to a limited class of purchasers" (Br. 18). There has never been any time limit on the "free" offer in *Black*

people in a community, that the regular and usual price of the books or combination of books was greater than the price at which they were being sold, and that the encyclopedias and other publications were an entirely new work. The Court of Appeals agreed with the Commission that the "pattern of conduct" was such as to justify an order of the breadth entered by the Commission, including an injunction against the use of the word "free" in the overall fraud scheme. Even so, however, the Commission subsequently modified its order to conform with the modification made of its original *Book-of-the-Month* order after its decision in *Black*. (*Matter of Standard Distributors*, 51 F. T. C. 677 (1955)).

Basic Books, Inc. v. FTC, 276 F.2d 718 (7th Cir. 1960), involving the sale of encyclopedias by high-pressure salesmen to housewives, the salesman's approach being to represent falsely that he was making a "survey" and introductory "free" offer of encyclopedias.

Kalwajtys v. FTC, 237 F.2d 654 (7th Cir. 1956), *cert. den.*, 352 U. S. 925 (1957), involving a calculated series of lies, all aimed at misleading housewives into believing that an unconditional "free" gift was being given and concealing the fact that it was actually a sales transaction.

or *Book-of-the-Month*. While the offer in *Black* was only to new members (membership being free to all), the offer of "free" books by Book-of-the-Month Club was on every purchase of two books. As Commissioner Elman said in assimilating Mary Carter and Book-of-the-Month, "Both involve a continuing offer over an indefinite period of time that can be acted on again and again by the same purchasers" (R. 61).

In arguing that a premium can "fairly be characterized as 'free' " only if offered for a "limited time or to a limited class of purchasers" (Br. 18), the Commission goes so far as to state, "This is the basis for the Commission's decision in the *Black* case and in *Book-of-the-Month Club, Inc*" (Br. 18 fn.). There is not only no basis for the statement, it is clearly contrary to the fact.

While the "free" offer in *Black* was, as we have just noted, only to new members, this was not true in *Book-of-the-Month*; nothing was said in the *Black* decision to suggest that such limitation had anything to do with the rationale of decision; and in neither case was there any element or consideration of a time limit on the offer.

Nor could the Commission possibly think that it is open to it to argue that the *Black* and *Book-of-the-Month* decisions, and its "Free Rule" distilled therefrom, are premised upon any time limitation on the "free" offer or imply that the time over which the offer is made is any consideration in determining the legitimacy of the use of the word "free."

This is evident from the Official Transcript Of Proceedings Before The Federal Trade Commission, In The Matter Of Proposed Guides Or Rules Relating To

Deceptive Pricing And The Use Of The Word "Free," of June 10 and 11, 1963. Before the Commission republished its Guides Against Deceptive Pricing, effective January 8, 1964, it issued a set of proposed guides or rules and held a public hearing for the purpose, as there expressed by Chairman Dixon, of "affording all the interested parties an opportunity to present their views on the subject of deceptive pricing and use of the word 'free'." The hearings were attended by a large number of representatives of trade associations, Better Business Bureaus, corporations, publications, law firms and others, offering their comments and suggestions. To focus attention and discussion on the alternatives of dealing with and regulating the use of the word "free" in advertising, the Commission published for consideration alternative forms of a "free" rule, one of which, "A", would have been a reversion to the original *Book-of-the-Month* rule, and the other, "B", was essentially the same as the rule formulated in *Black* and published as a rule in 1953 (*supra*, p. 6 fn. 4). Of the many who commented upon or offered suggestions with respect to the wording of the "free" rule, hardly any favored proposed rule "A". There were several, however, including the National Paint, Varnish and Lacquer Association spokesman, who expressed the view that the existing rule should be amended to add that the "free" offer could be made only for a limited time, as by adding a clause that the offer could not be a continuous or unlimited time offer (Official Transcript, pp. 424-425).

Obviously no one thought that there was any such limitation in the existing rule and the question was

whether something new should be added. The discussion of the subject was sharpened by a remark made and question put by Chairman Dixon to the representative of the National Paint, Varnish and Lacquer Association. As the Chairman said, "The *Black* rule, if I conceive it correctly, dealt purely and simply with the use of the word 'free.' It had nothing to do as to whether it was limited or unlimited or anything else" (Official Transcript, p. 435). Then, referring to the recommendation "that we should add this additional feature to the *Black* rule," the Chairman said that *Black* "laid down a rule that if you conspicuously and in the same type of language, and in connection therewith, explain the offer that it was all right. What is the difference? If it is done regularly, daily, when we are talking about the word 'free'? What is the difference? What does the limitation of time have to do with the word 'free' is what I am trying to get at." (Official Transcript, p. 436)

And clearly in the end the Commission was not persuaded that the additional feature should be added, for it was not added, and the rule was finally republished in substantially the same form as it had previously existed and as it was formulated in *Black* (*supra*, p. 7 fn.)

Therefore it is not admissible for the Commission to contend now that the *Black* decision or the rule distilled from *Black*, or the "free" rule as it existed at the time of its decision in this case, or as it exists now, imposed any time limitation on the "free" offer, or that the use of the word "free" can be held to be deceptive or distinguished from the use permitted by

Black or *Book-of-the-Month* on the basis that the offer is a continuing one and is not limited in time.

The claim that the Commission makes, in closing its argument on this point, to respect of great weight for its determination (Br. 19-20) is out of place in this case. It amounts to a plea for abandonment of judicial correction of its errors and indulgence in arbitrariness. Its expertise in deceptiveness cannot excuse a failure to show deceptiveness. Such a showing is entirely lacking here. If this were a case of first impression on the issue raised by the complaint, the plea for "due weight" for its determination might have some appeal upon the ground that in an area of policy determination the Commission should have a latitude of discretion. But the policy was determined and stated in *Black* and *Book-of-the-Month*. The authority of those decisions is binding upon the Commission. *Vitarelli v. Seaton*, 359 U. S. 535, 539-40 (1959); *Service v. Dulles*, 354 U. S. 363, 372 (1957); *United States ex rel. Accardi v. Shaughnessy*, 347 U. S. 260 (1954).

Conceivably the plea for respect for its determination might have some force if it had said, despite the solemnity of its pronouncement and rule formulation in *Black*, that upon reconsideration it thought the rule should be changed and a semblance of reason were given for the change. But here the Commission purports to recognize and respect the authority of *Black* and *Book-of-the-Month*. It relies on claimed distinctions between those cases and the present case. The distinctions do not exist. The Court of Appeals was entirely correct in holding that the Commission had failed to distinguish the cases or show any deceptiveness in re-

spondent's advertising. Judge Brown was also correct in saying that "Mary Carter is the victim of individualized discrimination" in the decision that was rendered against it by the Commission.

II.

The Commission Has Not Adequately Explained Why It Considered Respondent's Advertising Deceptive

The many deficiencies and complete untenability of the majority opinion of the Commission can most readily be observed by reading the opinion (R. 40-49) and Commissioner Elman's dissent (R. 50-66). The dissent really leaves nothing more to say. After pointing out the manifest errors in the majority opinion and its failure to make any valid distinction between this case and *Black* or *Book-of-the-Month*, Commissioner Elman concluded by referring to "perhaps the most serious deficiency in the majority opinion"—"nowhere does the Commission explain what was 'unfair or deceptive' about what Mary Carter did . . . we are never informed as to who is, or might be, misled by Mary Carter's 'Buy 1 and get 1 Free' offer, or as to how that deception might be brought about" (R. 64).

The Court of Appeals was in complete agreement with Commissioner Elman.

The argument now made by Commission counsel addressed to the point that "The Commission adequately explained why it considered respondent's advertising deceptive" (Br. 21-24) is really confession but hardly avoidance.

With the tendered excuse that the Commission's opinion was cast in terms of respondent's argument before the Commission, it is said "it did not (and could

not be expected to) consider some of the underlying premises" regarding the deceptive nature of respondent's advertising (Br. 21). Counsel "believe," however, that the Commission's view was that it was deceptive to use the word "free" in any situation other than one having an independent "usual and customary retail price"—which Mary Carter paint certainly had—although counsel find that "the opinion did not elaborate the Commission's reasons" and "did not explicitly focus upon the nature of the misrepresentation involved here" (Br. 22-23).

Finally, it is claimed that the decision of the Commission, "in light of its earlier cases," clearly draws the line between what is permissible and what is impermissible, although the reasons are only "implied" in the opinion (Br. 24).

The claim to clarity in drawing the line is belied, however, by the closing statement in the Commission's brief, that "If the Court upholds the Commission's position on the merits, the Commission believes that it would be appropriate to remand the case to it for clarification of its order" (Br. 34 fn.).

That is all that is said on the subject of the order, but its significance, when understood, is that lack of clarity in the order reflects lack of clarity in the opinion and inability of the Commission to distinguish between Mary Carter, Black and Book-of-the-Month.

The order of the Commission (R. 38) is that respondent "cease and desist from representing, directly or by implication:

"(a) That any amount is respondents' customary and usual retail price of any merchandise when said amount is in excess of the price at which such merchandise is customarily and usually sold by

respondents at retail in the recent and regular course of business;

“(b) That any article of merchandise is being given free or as a gift, or without cost or charge, when such is not the fact;”

The order is meaningless. It certainly is not what is claimed for the opinion, a “clearly” drawn “line between what is permissible and what is impermissible.” It is rather, as Commissioner Elman observed, “indefensibly vague,”⁸ and, as the Court of Appeals ob-

⁸ Commissioner Elman said the following of the order (R. 65):

“A reading of the order invites this question: What must respondents stop doing that they are now doing? Paragraph ‘(a)’ declares that they may not call any amount their usual and customary price if it is in excess of their usual and customary price in the recent, regular course of business. Obviously, this has as little to do with the case as Guide V of the Guides Against Deceptive Pricing. Respondents have never sought to represent their ‘recent’ prices; they advertise only their current prices. As it happens, however, their current prices are the same as their recent prices. Whether regarded as a one-can or two-can price, respondents’ advertised price of \$2.25 per quart, for example, is their ‘usual and customary retail price’ now, and it is not in excess of \$2.25 per quart, which is ‘the price at which such merchandise is customarily and usually sold by respondents at retail in the recent and regular course of business’. Does this mean that paragraph ‘(a)’ has no effect at all on respondents’ advertising practice? Surely not, or the Commission would not issue it. But what effect does it really have, and how are respondents to comply with it? I confess I do not know.

“Paragraph ‘(b)’ is almost as puzzling. Presumably, it is intended to require respondents to cease advertising ‘Buy 1 and get 1 Free’. But this cannot be deduced from anything to be found in the terms of the order. As the Commission’s own troubles with the problem show, the definition of ‘free’ merchandise is no easy matter. Yet respondents are ordered, on pain of heavy penalties, to cease and desist from describing merchandise as free ‘when such is not the fact’. Surely this provision, like paragraph ‘(a)’, is indefensibly vague, particularly in light of the Supreme Court’s recent call for Commission orders ‘sufficiently clear and precise to avoid raising serious questions as to their meaning and application’. Federal Trade Commission v. Henry Broch & Co., 368 U. S. 360, 368 (1962).”

served, "no more than a generality of legal statement which lacks any precision of meaning adequate to satisfy the requirement of clarity and applicability which the Supreme Court has said is the essence of a Commission order. *F.T.C. v. Henry Brosch, Inc.*, 368 U.S. 360."

The deficiency of the order does not make it "appropriate" that the case be remanded to the Commission for "clarification" of its order, as the Commission now suggests.⁹

The deficiency, reflecting the deficiency and untenability of the Commission's decision, calls for an affirmation of the Court of Appeal's order setting the order of the Commission aside.

III

The Commission Decision in This Case Is Not Consistent With the Commission's Precedents and Announced Rules

As has been noted: the Commission recognizes and purports to maintain the authority of its *Black* and *Book-of-the-Month Club* decisions. There is not the slightest suggestion from the Commission that it has intended or wishes to change the holding of those cases in the least. And, since its decision in this case the Commission has reaffirmed its "Free Rule," drawn from *Black*, published in 1953 (*supra*, p. 6, fn.), by republishing it in substantially the same form effective January 8, 1964 (*supra*, p. 7, fn.).

⁹ The deficiency in the order, which the Commission adopted from the initial decision of the hearing examiner, was called to the Commission's attention both in briefs and oral argument when the case was before the Commission on review of the hearing examiner's initial decision. Thus it was that Commissioner Elman made his comments on the order in his dissenting opinion.

There can be no question, therefore, that unless the Commission has drawn a *valid* distinction between the present case and *Black* and *Book-of-the-Month*, its order in this case cannot stand and the decision of the Court of Appeals must be affirmed. *Vitarelli v. Seaton*, 359 U. S. 535, 539-40 (1959); *Service v. Dulles*, 354 U. S. 363, 372 (1957); *United States ex rel. Accardi v. Shaughnessy*, 347 U. S. 260 (1954).

We turn then to the "distinguishable" features which the Commission purported to find in its decision in this case, and the quite different distinction tendered in support of the Commission's decision in the Commission's brief to this Court.

First, we will state with full quotation from the Commission's opinion all it said about the cases being distinguishable (R. 47-48):

"The facts of this case are clearly distinguishable from those of the two cases upon which respondents rely. In this case, the item required to be purchased in order to obtain another article has always been sold with the so-called 'free' article. Consequently, even if the item required to be purchased, i.e., a single can of Mary Carter paint, had had a usual and regular price when the offer was first made, the price would eventually become the usual and regular price of two cans of paint. In *Black* and *Book-of-the-Month Club*, however, while the policy of offering 'free' books was a continuing one, the merchandise required to be purchased in order to obtain a 'free' article was not always the same merchandise. In other words, the respondents in those cases made a series of offers involving entirely different books at varying prices, not a

continuing offer of a combination of the same two articles, as respondents in this case have done. Moreover, the cases are distinguishable in other respects. In Book-of-the-Month Club, the respondents advertised that a member of the Club would pay 'no more than the publisher's set price for each Book-of-the-Month, the price you would pay in any retail store; indeed, frequently you pay less.' This representation was never challenged and apparently was accepted as true by the Commission. Furthermore, it appears that in *Black*, books required to be purchased at stated prices in order to obtain a 'free' article were usually and regularly sold by that respondent at those prices without the 'free' article since the 'free' offer was limited to new members. Consequently, it appears that the Commission had no occasion to decide in either case whether the usual and regular price of a book required to be purchased in order to obtain a 'free' book might at some future date become the usual and regular price of both books."

Four possible distinctions are thus suggested. We will consider them in order.

(1) "In this case the item required to be purchased in order to obtain another article has always been sold with the so-called 'free' article." This was precisely the fact in both *Black* and *Book-of-the-Month*. As their regular merchandising policy and practice, "free" books were always given with purchased books.

(2) Recognizing that the policy of offering "free" books in *Black* and *Book-of-the-Month Club* was a "continuing" one, thus negating the immediately preceding distinction, it is said that "the merchandise required to be purchased in order to obtain a 'free'

article was not always the same merchandise," i.e., in *Black* and *Book-of-the-Month*, while the merchandise was always books, they were "different books at varying prices," not "the same two articles" as in this case. Passing the point that Mary Carter sells different paints at varying prices, the lack of any substance or validity in the distinction drawn is obvious. As Commissioner Elman observed, "The fact—deemed crucial by the Commission—that Mary Carter paint remains the same while the Club's book titles change is obviously a distinction without a difference" (R. 61).

(3) Book-of-the-Month Club advertised, without challenge, that a member would pay no more for a book than the publisher's set price in a retail store. Nothing is said about either Black's books or Mary Carter's paint in this connection. The fact is that Black's triple volumes of detective stories were sold only through Black's "Detective Book Club" and the Book-of-the-Month Club's books of its own printing and binding are sold only through the Club. Mary Carter paints, sold through Company stores and franchise dealers at retail, are always sold at the manufacturer's set retail price.

(4) In *Black* "the 'free' offer was limited to new members." It is not apparent what difference this would make, but it need not be dwelt upon, for in *Book-of-the-Month* there was no such limitation. It was always the regular practice of the Book-of-the-Month Club to give "free" books to all of its members whenever they purchased books. Thus, Commissioner Elman correctly pointed out that "Both [Mary Carter's offer and Book-of-the-Month's offer] involve a continuing

offer over an indefinite period of time that can be acted upon again and again by the same purchasers" (R. 61).

Turning now to the Commission's latest attempt to distinguish *Black*, and presumably *Book-of-the-Month*, it is argued (Br. 27) that there "the Commission was concerned only with a situation in which a seller had been marketing an article at a standard, ordinary or usual price and wished to offer a 'free' bonus for a limited time or to a limited group of people (i.e., new members)."

While the Commission in its opinion in this case, as has been noted, did attempt a distinction from *Black* on the ground that the offer there was "limited" to new members—a distinction that cannot be made for *Book-of-the-Month*—it said nothing about any "limited time" distinction. There can be none, for there was nothing of a time limit in either *Black* or *Book-of-the-Month*. We have amply pointed out (*supra*, pp. 21-24) that there is no basis for suggesting that *Black* or *Book-of-the-Month* involves, much less turned upon, any time limitation, or for suggesting any distinction between those cases and the present case on that ground.

In the end, the Commission argument comes back to the mere *ipse dixit* repeated throughout its brief that *Black* and *Book-of-the-Month* were cases in which the article required to be purchased had an established price, while here the article has no established price (R. 29). The answer to this unsupported assertion is the one given by Commissioner Elman, previously referred to, it "simply is not so" (R. 58).

Finally, the Commission brief refers to Commission decisions rendered after *Black*, one of which it states "involved facts very close to those in this case" (Br. 29-31)—none of which, however, was so much as mentioned in the Commission's decision in this case. The failure of the Commission to cite those cases in its decision was no oversight, for the cases were cited to the Commission by its counsel on briefing and argument before the Commission on its review of the hearing examiner's initial decision. Obviously the Commission did not find them to be in point or it certainly would have cited them.

It will be recalled that the explanation given in the Commission's brief for the Commission's failure to deal in its opinion with the "underlying premises" of the "deceptive nature" of respondent's advertising was that the opinion "was cast in terms of the arguments respondent made before the Commission"—the "principal contention" being "that the hearing examiner erred in concluding that Mary Carter's advertising was not proper under the so-called 'free rule' enunciated by the Commission in the *Black* decision" (Br. 21). Surely, therefore, if there were decisions since *Black*, which, as counsel for the Commission now state, "support the result reached here and demonstrate that the rules announced in *Black* were not intended to apply" here, those decisions would have been cited in the Commission's opinion. The only conclusion possible is that the Commission did not then regard them as the "precedents" it now claims them to be.

Indeed, the failure of the Commission to mention any case in support of its decision in this case is

the more significant because Commissioner Elman took the pains to point out that the *Puro Co.* case, 50 F. T. C. 454, then as now advanced by counsel for the Commission as a case that "involved facts very close to those in this case" (Br. 29), was very different from the case at bar (R. 62-63).

When the cases now cited as "precedents" in support of the Commission's decision are looked at it becomes understandable why they were not mentioned in the Commission's opinion.

Puro (Br. 29) was a case of a false pretense that a "coupon" was necessary to get a "free" package of a water softener cleanser, and that the article sold at 25¢, with a second article free with a coupon, when the fact was that the coupon meant nothing and the article regularly sold in stores at 13¢ a single package or two packages for 25¢. Contrawise here, as Commissioner Elman pointed out, "In the instant case, the record does NOT disclose that a single quart of Mary Carter paint was ever sold for \$1.13; and, in view of Mary Carter's established and long-continued merchandising policy, it clearly would not sell a single quart at that price" (R. 86-87) and "The Commission does not dispute Mary Carter's contention that it refuses to sell a single can of paint at less than the stated price of \$6.98 per gallon or \$2.25 per quart" (R. 83-84).

Roy S. Kalwajtys, 52 F. T. C. 721, affirmed 237 F.2d 654 (7th Cir.), cert. den., 352 U. S. 1025 (Br. 30), involved a calculated series of lies, all aimed at misleading housewives into believing that an unconditional "free" gift was being given and concealing the fact that it was actually a sales transaction.

International Association of Photographers, 52 F. T. C. 1450, like *American Albums, Inc.*, 53 F. T. C. 913, (Br. 31) was a case in which sales representatives of respondent, seeking to sell certificates for photographs to be taken and photograph albums, falsely represented that the person called upon had been specially selected to receive a free album and that the price for the albums and certificates were promotional and reduced prices, falsely represented their value, falsely represented respondent's arrangements with photographers, and falsely represented that an order blank was a receipt for a free album.

The Commission concludes its brief by eschewing its applicable "Free" Rule and rearing a straw man. It refers to Guide V of the Commission's Guides Against Deceptive Pricing, which is its rule with respect to "two for the price of one" advertising (Br. 31-32). The import of the reference is not clear, as there is no claim that respondent was in violation of the rule, and there could not be any such claim because respondent has never engaged in "two for the price of one" advertising. As Commissioner Elman stated of the reference to Guide V in the Commission's opinion, "it has no application" to the present case (R. 62).

Were Guide V applicable, however, there is no basis for suggesting that respondent's advertising was not in compliance with its requirement that "the sales price for the two articles is the advertiser's usual and customary retail price for the single article in the recent, regular course of his business." Indeed, the Commission throughout its brief has based its argument that the

second can of Mary Carter paint is not "free" on the fact that the cost to the purchaser is the same for two cans as for a single can.

Looked at in any way, respondent's offer of a second can "free" on the purchase of a can at the established and regularly maintained single can price is an honest representation, altogether proper in accordance with Commission decisions and rules.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 15

FEDERAL TRADE COMMISSION, PETITIONER

v.

MARY CARTER PAINT CO., ET AL.

**CN WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT**

REPLY BRIEF FOR THE FEDERAL TRADE COMMISSION

The Commission is filing this brief in reply to respondents' contention that the decision in this case is irreconcilable with *Book-of-the-Month Club, Inc.*, 50 F.T.C. 778. Respondents' contention rests on a reading of the *Book-of-the-Month Club* decision which, for the reasons stated below, we believe to be erroneous.

1. On June 30, 1948, the Commission filed a complaint against the Book-of-the-Month Club, in which it charged that the Club had deceptively used the words "free" and "book dividends" in its advertising. The Commission alleged that these terms were misleading because "the books designated as 'free' or

as 'book dividends' are not gifts or gratuities or without cost to the recipient but on the contrary the prospective purchaser or purchasers, before he is entitled to receive such books, must join respondents' club thereby becoming obligated to purchase at least four books from respondents over the period of a year, the fulfillment of which obligation inures directly to the benefit of, and profit to, the respondents." Illustrative of this allegedly deceptive advertising were a folder and card representing as "free" the books received upon enrollment, the monthly magazine published by the Club, and the book-dividend given with the purchase of every two selections. 48 F.T.C. 1300-1302.

2. A hearing was held before a trial examiner, and the Commission in 1952 entered findings of fact. Findings 4 through 7 read as follows (48 F.T.C. at 1306):

Par. 4. The use of the word "free" to describe the "enrollment" book has tremendous advertising value in inducing people to sign and send in the membership coupon.

Par. 5. The use by the respondent of the word "free" is false, misleading, and deceptive. In truth and in fact, the books designated as "free" are not gifts or gratuities or without cost to the recipient but, on the contrary, the prospective member, before he is entitled to receive such books, must join the Book-of-the-Month Club and assume the obligation to purchase at least four books from respondent over the period of a year, the fulfillment of which obligation inures directly to the profit of the

respondent. Additional evidence of the fact that such books are not free is the fact that if a member does not purchase at least four books from the respondent within a year of his application for membership in the Book-of-the-Month Club, payment for the book theretofore designated as "free" is thereafter demanded by the respondent.

Par. 6. Respondent's advertisements have the tendency and capacity to deceive, and actually have deceived, members of the purchasing public into the erroneous and mistaken belief that books offered by respondents as "free to new members" are in fact given without charge or obligation to new members of Book-of-the-Month Club.

Par. 7. The compliant herein also charges that the respondent's use of the term "book-dividends" is false, misleading, and deceptive. The Commission is of the opinion, and so finds, that this charge is not sustained by the evidence.

3. The Commission's order directed the Club to cease and desist from (48 F.T.C. at 1307):

Using the word "free," or any other word or words of similar import or meaning, in advertising to designate or describe any book, or other merchandise, which is not in truth and in fact a gift or gratuity or is not given to the recipient thereof without requiring the purchase of other merchandise or requiring the performance of some service inuring, directly or indirectly, to the benefit of the respondent.

4. Near the beginning of the Commission's accompanying opinion (written by Chairman Mead), the

Commission noted that "[t]he charge in the complaint with respect to respondents' use of the term 'book-dividends' is not sustained." 48 F.T.C. at 1308. The remainder of the opinion discussed only the advertisements aimed at "prospective subscribers" (48 F.T.C. at 1309), and noted that "[t]he *enrollment books* are either free or they are not free" (*ibid.*, emphasis added). The Commission's conclusion was substantially summarized in the following paragraph (48 F.T.C. at 1314):

In the present case it is clearly established by substantial evidence that the use of the word "free" in respondent's advertisements is a material representation describing the "enrollment" book; that the representation has tremendous advertising value in inducing prospective purchasers to sign and send in the membership coupon; that the representation is false, and not only has the tendency and capacity to mislead and deceive, but actually had deceived prospective purchasers into the erroneous and mistaken belief that the "enrollment" book offered by respondent as "free" would in fact be given without cost or other obligation. We are of the opinion that the acts and practices of the respondent are all to the prejudice and injury of the public, that the public is entitled to be protected against this species of deception, and that its interest in such protection is specific and substantial.

The Commission did not, in its opinion or fact-findings, otherwise discuss use of the word "free" with regard to the Club's book-dividend policy.

5. In ordering compliance with the Commission's order, the Court of Appeals for the Second Circuit summarized the relevant facts as follows (202 F. 2d 486, 488-489):

The crucial factor here is that the Book-of-the-Month Club typically publishes an advertisement which states in large print at the top, "Free * * * to new members of the Book-of-the-Month Club" a copy of some designated book. This advertisement contains, at the bottom and in much smaller print, a coupon which, when signed and sent to the Club, constitutes a contract between it and its new "member"; this coupon states that he is to "receive free" the designated book, and that he agrees "to purchase at least four books-of-the-month a year from the Club." The evidence shows that the so-called "free book" is not, in fact, a gift: If the member fails to buy four books-of-the-month within a year after joining the Club, the Club demands and expects to collect from him the retail price of the "free" book, although sometimes the Club will relinquish this demand provided the "free" book is returned to it. * * *

6. Subsequent to the decision in *Walter J. Black, Inc.*, 50 F.T.C. 225, the Commission in 1954 modified its order in the *Book-of-the-Month Club* case. 50 F.T.C. 778. It noted that the Club would, under the existing order, "be placed at an unfair competitive disadvantage with their competitors upon whom such an order would not now be imposed." 50 F.T.C. at 780. After stating the *Black* rule, the Commission observed that the respondents had violated even that

rule because "they did not clearly and conspicuously disclose in said advertising all of the conditions, obligations, or other prerequisites to the receipt and retention of the book referred to therein as 'free.' Specifically, the respondents did not disclose the fact, and that it was a fact is undisputed by the respondents, that if a member of the Book-of-the-Month Club failed or refused to purchase at least four books within a year after joining the club, payment for or the return of the book theretofore designated as 'free' would be required." 50 F.T.C. at 781. Consequently, the Commission entered an order substantially in the language of the *Black* rule.

Respondents assert repeatedly in this Court that the Commission's *Book-of-the-Month Club* decision permitted use of the word "free" to describe the Club's "book-dividend" policy of giving a third book with every two that were purchased (Resp. Br. 14, 22, 32, 33). This, respondents contend, is identical to their merchandising arrangement. Assuming, *arguendo*, that the Book-of-the-Month Club's "free book-dividend" policy is similar to respondents' "free can of paint,"¹ we do not believe an examination of the

¹ We do not believe that the two situations are the same. The books offered by the Book-of-the-Month Club had an established retail publisher's price for editions which were indistinguishable from—although not identical to—those offered by the Club. The Club could therefore say—just as the gasoline filling station would in the illustration at page 32 of our main brief—that the "dividend" book was "free" because it was a bonus added at no cost on the purchase of the identical product being sold by other vendors.

history of the *Book-of-the-Month Club* case bears out the suggestion that the Commission's 1954 decision constituted approval of the Club's use of the word "free" to describe its book dividends. On the contrary, although the initial complaint alleged that the word "free" was being deceptively used with respect to book dividends, the Commission's findings and opinion dealt exclusively with the enrollment offer. Respondents themselves have noted that the Commission "found that the like charge with respect to the 'free' book given with each two books purchased had not been sustained." Resp. Br. 4-5, note 1.

Whatever the reason, it seems clear that neither the Commission nor the court of appeals—nor even the Commission on the case's second appearance—either approved or disapproved the Club's use of the word "free" with respect to its book dividends. The Commission's dismissal of the latter charge was based on the finding that it was "not sustained by the evidence" and did not, therefore, purport to validate such advertising as not deceptive. All that the Commission decided was the issue presented in the *Black* case—whether an offer of bonus books to new members who agree to purchase a minimum quantity may be called "free." We do not believe, therefore, that the *Book-of-the-Month Club* case can be fairly represented as a deliberate holding by the Commission that an offer not limited to new members but open to any-

one who purchased two books could be characterized as "free."

Respectfully submitted.

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OCTOBER 1965.

SUPREME COURT OF THE UNITED STATES

No. 15.—OCTOBER TERM, 1965.

Federal Trade Commission,	} On Writ of Certiorari to	
Petitioner,		the United States Court
v.		of Appeals for the Fifth
Mary Carter Paint Co. et al.	} Circuit.	

[November 8, 1965.]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Respondent manufactures and sells paint and related products. The Federal Trade Commission ordered respondent to cease and desist from the use of certain representations found by the Commission to be deceptive and in violation of § 5 of the Federal Trade Commission Act, 38 Stat 111, as amended, 52 Stat. 111, 15 U. S. C. § 45 (a)(1) (1958 ed.). 60 F. T. C. 1830, 1845. The representations appeared in advertisements which stated in various ways that for every can of respondent's paint purchased by a buyer, the respondent would give the buyer a "free" can of equal quality and quantity. The Court of Appeals for the Fifth Circuit set aside the Commission's order. 333 F. 2d 654. We granted certiorari, 379 U. S. 957. We reverse.

Although there is some ambiguity in the Commission's opinion, we cannot say that its holding constituted a departure from Commission policy regarding the use of the commercially exploitable word "free." Initial efforts to define the term in decisions¹ were followed by "Guides

¹ *Book-of-the-Month Club, Inc.*, 48 F. T. C. 1297 (1948); *Walter J. Black, Inc.*, 50 F. T. C. 225 (1953); *Puro Co.*, 50 F. T. C. 454 (1953); *Book-of-the-Month Club, Inc.*, 50 F. T. C. 778 (1954); *Ray S. Kahwajtya*, 52 F. T. C. 721 (1956), enforced, 237 F. 2d 654.

Against Deceptive Prices."² These informed businessmen that they might advertise an article as "free," even though purchase of another article was required, so long as the terms of the offer were clearly stated, the price of the article required to be purchased was not increased, and its quality and quantity were not diminished. With specific reference to two-for-the-price-of-one offers, the Guides required that either the sales price for the two be "the advertiser's usual and customary retail price for the single article in the recent, regular course of his business," or where the advertiser has not previously sold the article, the price for two be the "usual and customary" price for one in the relevant trade areas. These, of course, were guides, not fixed rules as such, and were designed to inform businessmen of the factors which would guide Commission decision. Although Mary Carter seems to have attempted to tailor its offer to come within their terms, the Commission found that it failed; the offer complied in appearance only.

The gist of the Commission's reasoning is in the hearing examiner's finding, which it adopted, that "the usual and customary retail price of each can of Mary Carter paint was not, and is not now, the price designated in the advertisement [\$6.98] but was, and is now substantially less than such price. The second can of paint was not, and is not now, 'free,' that is, was not, and is not now, given as a gift of gratuity. The offer is, on the contrary, an offer of two cans of paint for the price advertised as or purporting to be the list price or customary and usual price of one can."

² Guides Against Deceptive Pricing, Guide V, adopted October, 1958, 23 Fed. Reg. 7965; see also Policy Statement, December 3, 1953, 4 CCH Trade Reg. Rep. ¶40,210. For the current guide, Guide IV, effective January 8, 1964, see 29 Fed. Reg. 180.

In sum, the Commission found that Mary Carter had no history of selling single cans of paint; it was marketing twins, and in allocating what is in fact the price of two cans to one can, yet calling one "free," Mary Carter misrepresented. It is true that respondent was not permitted to show that the quality of its paint matched those paints which usually and customarily sell in the \$6.98 range, or that purchasers of paint estimate quality by the price they are charged. If both claims were established, it is arguable that any deception was limited to a representation that Mary Carter has a usual and customary price for single cans of paint, when it has no such price. However, it is not for courts to say whether this violates the Act. "[T]he Commission is often in a better position than are courts to determine when a practice is 'deceptive' within the meaning of the Act." *Federal Trade Comm'n v. Colgate-Palmolive Co.*, 380 U. S. 374, 385. There was substantial evidence in the record to support the Commission's finding; its determination that the practice here was deceptive was neither arbitrary nor clearly wrong. The Court of Appeals should have sustained it. *Federal Trade Comm'n v. Colgate-Palmolive Co.*, *supra*; *Carter Products, Inc. v. Federal Trade Comm'n*, 323 F. 2d 523, 528.

The Commission advises us in its brief that it believes it would be appropriate here "to remand the case to it for clarification of its order," rather than to remand to the Court of Appeals. The judgment of the Court of Appeals is therefore reversed and the case is remanded to that court with directions to remand to the Commission for clarification of its order.

It is so ordered.

MR. JUSTICE STEWART took no part in the decision of of this case.

In sum, the Commission found that Mary Carter had no
 means of selling single cans of paint. It was marketing
 twines and in allocating what is in fact the price of two
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 Co., supra, 350 F. 2d 523, 528.
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 that court with instructions to remand to the Commission
 for clarification of its order.

It is so ordered.

MR. JUSTICE STEWART took no part in the decision of

SUPREME COURT OF THE UNITED STATES

No. 15.—OCTOBER TERM, 1965.

Federal Trade Commission, } On Writ of Certiorari to
Petitioner, } the United States Court
v. } of Appeals for the Fifth
Mary Carter Paint Co. et al. } Circuit.

[November 8, 1965.]

MR. JUSTICE HARLAN, dissenting.

In my opinion the basis for the Commission's action is too opaque to justify the courts upholding its order in this case. A summary discussion of the facts and Commission proceedings will suffice to show why I cannot subscribe to the majority's disposition.

Since 1951 the enterprise now known as Mary Carter Paint Company has been manufacturing paint products for direct distribution through its own outlets and franchised dealers. For most or all of this period, its practice has been to establish its prices on a per-can basis but to give each customer a second can without further charge for each can purchased. Mary Carter's advertisements, while disclosing that the first can of each pair must be bought at the listed price, have always described the second can as "free"; typical slogans are: "Buy one get one free" and "Every second can free." It is this advertising which the Commission now condemns as unfair and deceptive under § 5 of the Federal Trade Commission Act, as amended, 52 Stat. 111, as amended, 15 U. S. C. § 45 (1964 ed.).

To the extent that the Commission's order may rest on the proposition that the second can is not "free" because its receipt is "tied" to the purchase of the first can, it is manifestly inconsistent with the rules govern-

2 FTC v. MARY CARTER PAINT CO.

ing use of the word "free" maintained by the Commission for over a decade. No one suggests that the additional can of Mary Carter paint is free in the sense that no conditions are attached to its receipt, but the FTC forsook this commercially unrealistic definition in 1953. In that year, first by its decision in *Walter J. Black, Inc.*, 50 F. T. C. 225, and then a general policy statement, 4 CCH Trade Reg. Rep. ¶ 40,210, it sanctioned use of the word "free" to describe an item given without extra charge on condition of another purchase so long as the condition was plainly stated and the "tying" product was not increased in price for the occasion or decreased in quantity or quality. The FTC prefaced these rules in *Black* by saying that "[t]he businessmen of the United States are entitled to a clear and unequivocal answer" and it represented that its new position would be maintained until either Congress or the courts decided otherwise. 50 F. T. C., at 232, 235.

There is presently no charge by the Commission that Mary Carter failed to comply with this general statement which continued in force through the proceedings and decision affecting Mary Carter. Rather, for the greater period of its advertising operations Mary Carter could properly claim to have relied on the FTC's official pronouncement while it was establishing its "every second can free" slogan in the public mind, an investment now seemingly lost. Without inflexibly holding the Commission to its promise and avowed position, certainly solid justification should be demanded before the courts agree that this departure is not "arbitrary, capricious, [or] an abuse of discretion." Administrative Procedure Act § 10 (e), 60 Stat. 243, 5 U. S. C. § 1009 (e) (1964 ed.).

At the very least the Commission should be required to demonstrate real deception and public injury in a decision that allows the courts to evaluate its reasoning and businessmen to comply with assurance with its latest

views; these standards are not met by the FTC's opinion in this case. The Department of Justice suggests that the FTC regards the advertisements as implying that Mary Carter regularly sells its paint for the present per-can price without giving an extra can free;¹ from this premise, it might be argued, the buyer may then conclude that each can of Mary Carter is the equal of similarly priced rivals with whom it has regularly competed on equal terms in the past, making the present "free" can offer appear an excellent bargain. But the advertising in the present case does not really suggest that the "free" can is a departure from Mary Carter's usual pricing policy. Certainly nothing in any of the publicity states that the extra can is a "new" bargain or asserts that the opportunity may lapse in the near future. To the contrary, a number of Mary Carter advertisements, not separately treated by the Commission, affirmatively suggest that the extra-can offer has been and will continue to be the sales policy. Far from trying to imply that its extra-can offer represents a temporary saving for the customer, Mary Carter has striven over a number of years to associate itself irrevocably in the public mind with the notion that every second can is free; the catchphrase appears in one form or another in nearly all the ads before us

¹ Such an implication might be thought to run counter to the spirit of the now-superseded Guide V, Guides Against Deceptive Pricing, 23 Fed. Reg. 7965 (1958), requiring that the sales price for two articles in a two-for-the-price-of-one sale must be the usual and customary price for one. Mary Carter can, of course, reasonably claim to have complied with the letter of Guide V; assuming that it is making a two-for-the-price-of-one offer in substance, the advertised sum is the usual and customary price which a purchaser has to pay in order to acquire a single can. There is evidence that on at least a few occasions customers took only one can, paying the advertised per-can price. There is no evidence that Mary Carter permitted or tolerated sales of single cans at less than the advertised per-can price.

and is even imprinted on the top of Mary Carter paint cans. Finally, it is not without irony that the Commission, presumably seeking to protect the consumer from any unfounded ultimate conclusions that a can of Mary Carter is as good as its high-priced rivals, rejected an offer of proof from the company that a single can of Mary Carter is scientifically equal or superior to the leading paints that sell at the same per-can price level without giving bonus cans. Actually, there is no suggestion that any volume of consumer complaints has been received, which further deepens the mystery why this frail proceeding was ever initiated.²

The temptation to gloss over the analytical failings of the rationale now asserted for the FTC by relying on agency expertise must be short-lived in this case. Any findings by the FTC as to what the public may conclude from particular phrasings are most inexplicit, no distinction is taken between the various ads in question, and the conduct proscribed is never sharply identified. Surely there can be no resort to uninvoked expertise to buttress an unarticulated theory.

The opaqueness of the Commission's opinion and order make their approval difficult for yet other reasons. The bite of the FTC decision is in its order, which even the Commission recognizes to be unclear; how the Commission order can be upheld before this Court is told what exactly it means is indeed a puzzling question. Additionally, by failing to spell out its rationale the FTC

² I put aside the argument that might arise from Mary Carter's practice of selling its paint in both gallon and quart cans. Conceivably, one might order a gallon and receive an unneeded extra gallon, never realizing that two quarts purchased plus two quarts free could be had for a smaller sum. The FTC ignored and the Government expressly disclaims reliance on any such argument. Moreover, many ads seem to give both quart and gallon prices.

decision breeds the suspicion that it is not merely *ad hoc*³ but quite possibly irreconcilable with the *Black* case seemingly reaffirmed by the Commission in this very proceeding. If the Commission is able to write an opinion and order that can cure these defects and draw the plain distinctions necessary to assure fair warning and equal treatment for other advertisers, it has not done so yet.

In administering § 5 in the context of the many elusive questions raised by modern advertising, it is the duty of the Commission to speak and rule clearly so that law-abiding businessmen may know where they stand. In proscribing a practice uncomplained of by the public, effectively harmless to the consumer, allowed by the Commission's long-established policy statement, and only a hairbreadth away from advertising practices that the Commission will continue to permit, I think that the Commission in this instance has fallen far short of what is necessary to entitle its order to enforcement.

For these reasons I would not disturb the judgment of the Court of Appeals setting aside the Commission's order.

³ Of the post-1952 cases cited in the majority's note 1 (*ante*, p. —), none is authority for condemning Mary Carter's advertising. *Puro Co.*, 50 F. T. C. 454 (1953), and *Ray S. Kalwajtyz*, 52 F. T. C. 721, enforced, 237 F. 2d 654 (C. A. 7th Cir. 1956), both involved plain deceptions as to the usual prices of the items in question. *Book-of-the-Month Club, Inc.*, 50 F. T. C. 778 (1954), and the *Black* case both exculpate sellers under the rule finally appearing in the 1953 policy statement, with whose terms Mary Carter has complied.